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ONTARIO LABOUR RELATIONS BOARD REPORTS

October 1993



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1993] OLRB REP. OCTOBER

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario



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TATE ANDALE CANADA INC.; USWA 1019

Interference in Trade Unions - Adjustment Plan - Discharge - Interim Relief - Remedies - Unfair Labour Practice - Bargaining unit chairperson discharged some months before scheduled closure of part of employer's plant - Chairperson's discharge grievance being arbitrated, but arbitration proceeding likely to continue beyond closure date - Employer refusing to discuss adjustment plan with union so long as chairperson included on union's bargaining committee - Union seeking order preventing employer from refusing to allow chairperson to participate as member of union committee negotiating adjustment plan - Employer identifying no significant harm resulting from granting order sought - Board directing employer to cease and desist from refusing to recognize and deal with chairperson as member of union committee, and also to meet with union committee in order that parties may bargain in good faith to make adjustment plan

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in union organizing campaign - Board satisfied that, as result of employer violations of the *Act*, true wishes of employees unlikely to be ascertained - Board regarding it as unnecessary to consider whether or not union having adequate membership support for collective bargaining, in view of clear direction to the Board in legislature's amendment of section 9.2 of the *Act* - Certificate issuing

CARLETON UNIVERSITY STUDENTS' ASSOCIATION INC.; RE CUPE 938

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ASSOCIATED CONTRACTING INC.; RE THE QUEEN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), THE OLRB AND IUOE, LOCAL 793 1071

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CROWN FAB DIVISION, THE ALLEN GROUP CANADA, LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1256

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Remedies - Construction Industry - Construction Industry Grievance - Related Employer - Carpenters' union having collective agreement with franchisor - Franchisees entering into agreements with non-union contractors to perform certain renovation work - Board finding that franchisees and franchisor carrying on related activities under common control and direction - Board making single employer declaration, but limiting its application to renovations, including new store construction, agreed to between the responding parties

THE SECOND CUP LTD., AND 953455 ONTARIO LIMITED; RE CJA LOCAL 785 ...

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TATE ANDALE CANADA INC.; USWA 1019

Strike - Abandonment - Bargaining Rights - Conciliation - Construction Industry - Evidence - Judicial Review - Employer asserting that threatened strike unlawful on ground that union had previously abandoned bargaining rights - Threatened strike following timely “notice to bargain”, appointment of conciliation officer and issuance of “no board” report - Board declining to inquire into continued existence of bargaining rights in circumstances of this case - Board also not accepting employer’s assertion that threatened picketing by union improperly motivated and, therefore, unlawful - Application dismissed - Employer applying for judicial review and seeking to have matter heard before single judge on grounds of urgency - Court not satisfied that matter “urgent” and transferring application to Divisional Court

ASSOCIATED CONTRACTING INC.; RE THE QUEEN IN RIGHT OF ONTARIO (MINISTER OF LABOUR), THE OLRB AND IUOE, LOCAL 793 1071

Strike - Unfair Labour Practice - Union asserting that employer violated *Act* when it denied bonus payments to striking employees in the years 1991 and 1992 - Board finding that while it may have been permissible for employer to have withheld bonus payments to striking employees under strict terms of “recognition bonus plan”, its reasons for doing so were not free of anti-union or prohibited considerations - Employer directed to compensate employees

THE CAMBRIDGE REPORTER, A DIVISION OF THOMSON NEWSPAPERS CORPORATION, THOMSON NEWSPAPERS CORPORATION AND; RE SOUTHERN ONTARIO NEWSPAPER GUILD 1035

Termination - Bargaining Rights - Certification - Practice and Procedure - Timeliness - Union responding to employer application to terminate bargaining rights under section 60 of the *Act* by consenting to Board order terminating bargaining rights - Union applying for certification in respect of same bargaining unit two weeks later - Board rejecting employer’s argument that it ought to refuse to entertain union’s certification application and that any new certification application should be barred for six months - Certificate issuing

CRANE CANADA INC.; RE LIUNA, LOCAL 247 957

Timeliness - Bargaining Rights - Certification - Practice and Procedure - Termination - Union responding to employer application to terminate bargaining rights under section 60 of the *Act* by consenting to Board order terminating bargaining rights - Union applying for certification in respect of same bargaining unit two weeks later - Board rejecting employer’s argument that it ought to refuse to entertain union’s certification application and that any new certification application should be barred for six months - Certificate issuing

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- CROWN FAB DIVISION, THE ALLEN GROUP CANADA, LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1256 960
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affected by impugned conduct and directing interim reinstatement of discharged employees pending disposition of unfair labour practice complaint

TATE ANDALE CANADA INC.; USWA 1019

Unfair Labour Practice - Strike - Union asserting that employer violated *Act* when it denied bonus payments to striking employees in the years 1991 and 1992 - Board finding that while it may have been permissible for employer to have withheld bonus payments to striking employees under strict terms of "recognition bonus plan", its reasons for doing so were not free of anti-union or prohibited considerations - Employer directed to compensate employees

THE CAMBRIDGE REPORTER, A DIVISION OF THOMSON NEWSPAPERS CORPORATION, THOMSON NEWSPAPERS CORPORATION AND; RE SOUTHERN ONTARIO NEWSPAPER GUILD 1035

2338-92-U; 2339-92-U; 2344-92-U; 2345-92-U Canadian Stagehands Association [“CSA”], Applicant v. Corporation of the City of Ottawa [“the City”] and **Bass Clef**, Responding Parties v. International Alliance of Theatrical Stage Employees, Local 471 [“IATSE”], Intervenor; Canadian Stagehands Association [“CSA”], Applicant v. Corporation of the City of Ottawa [“the City”] and MCA Concerts Canada [“MCA Concerts”], Responding Parties v. International Alliance of Theatrical Stage Employees, Local 471 [“IATSE”], Intervenor

Lock-Out - Canadian Stagehands’ Association (CSA) complaining about arrangement whereby City of Ottawa will only rent its facilities to promoters having collective bargaining relationship with rival union (IATSE) or who agree to use IATSE members for stage hand work - Board not accepting CSA’s contention that arrangement causing illegal lock-out for which relief available against City or promoters

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Sean T. McGee* for Canadian Stagehands Association; *Carey B. Thomson* for the Corporation of the City of Ottawa; *Ian D. Werker* for MCA Concerts Canada; *Sharona Freudmann* for Bass Clef Entertainments Ltd.; *David Jewitt* for the International Alliance of Theatrical Stage Employees, Local 471.

DECISION OF THE BOARD; October 18, 1993

1. For ease of reference in this decision, the parties will be referred to in abbreviated form. The Canadian Stagehands Association will be referred to as “CSA”, the Corporation of the City of Ottawa will be referred to as “the City”, Bass Clef Entertainments Ltd., and MCA Concerts Canada will be referred to, individually, as “Bass Clef”, or “MCA Concerts” and, collectively, as “the promoters”, and Local 471 of the International Alliance of Theatrical Stage Employees will be referred to simply as “IATSE”.

I

2. This proceeding originates as a series of interrelated applications under sections 91 and 94 of the *Labour Relations Act*. In each of these applications, CSA challenges an arrangement between the City and various concert promoters which, in CSA’s submission, unlawfully deprives its members of work opportunities. The gist of that arrangement is quite simple: the City will only rent its facilities to promoters who have a collective bargaining relationship with IATSE, or who agree to use IATSE members for “stage hand work” that is done in the City’s buildings.

3. CSA contends, among other things, that this arrangement has caused the promoters to unlawfully “lock out” the CSA members. The Act defines the term “lock-out” this way:

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer’s employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.

4. The responding parties raise a variety of issues in reply, including: whether CSA is a “trade union” within the meaning of the Act; whether CSA has a valid collective agreement with

the named promoters; whether that collective agreement contemplates the very situation here under review and thus answers the “lock-out” allegations (i.e., permits the promoters to “refuse to employ” CSA members in the circumstances here present); whether there is a collective bargaining relationship between IATSE and the City that provides a legal platform for the arrangement that CSA challenges; whether the Board can or should interfere with the conditions which the City, as property owner, imposes upon those who rent its facilities; whether these proceedings should be “deferred to arbitration”, and whether this controversy is “really” a jurisdictional dispute between two unions, which should be dealt with pursuant to section 93 of the Act. Section 93 reads, in part:

93.-(1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers’ organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or

The promoters contend that they are “caught in the middle” between two unions, both of which are demanding that work be assigned to their members. The promoters assert that this is a “jurisdictional dispute” which ought to be dealt with under section 93, not section 95 which deals with “lock-outs”.

5. When these matters originally came on for hearing before the Board, the parties met with a Labour Relations Officer in an effort to resolve the matters in dispute between them. Eventually counsel were able to work out a tentative settlement, and since no one was anxious to proceed with protracted, problematic, and potentially costly litigation, the case was adjourned pending ratification of that settlement. Unfortunately, the settlement was not ratified, and it is therefore necessary to address at least some of the issues/arguments which the parties have raised.

6. The parties have all agreed that it might expedite matters if the Board were to rule on a “best case” basis, whether certain stipulated facts could amount to an illegal lock-out for which relief was available. For this purpose, each of the parties was prepared to set aside, for now, certain legal arguments and factual challenges, that they have raised in their pleadings. Instead, the parties have constructed a factual scenario upon which they have all made written argument.

7. This approach was somewhat novel, and, in the result, the parties’ statements were not completely congruent. However, it appears to the Board that it is a sensible way to proceed, and that the Board can, in fact, make the requested ruling based upon the material before it (i.e., agreed facts, assertions which for present purposes the parties will not challenge, certain background information which is not seriously in dispute, and counsel’s written representations).

8. The Board is prepared to proceed on the basis to which the parties have agreed - provided it is understood that the Board’s decision in this regard must be read in light of the parties’ agreements, and the limitations set out above.

II

9. IATSE is an international union with substantial membership in the United States and Canada. IATSE has a multiplicity of collective bargaining relationships in Ontario and elsewhere. IATSE has had a collective bargaining presence in the Ottawa region for many years.

10. By contrast, CSA is a relatively new organization that was formed in 1992 by former members of IATSE, following an internal dispute within the IATSE organization. The details of that dispute are not particularly relevant. It suffices to say that IATSE locals with responsibility for

different entertainment complexes in Ottawa, were amalgamated into a single, composite, local; and, thereafter, there was a dispute within the combined IATSE membership over how regional work opportunities should be distributed. That dispute resulted in the departure of certain IATSE members who, with others, formed the CSA.

11. Bass Clef and MCA Concerts are promoters that stage entertainment events in halls or theatres owned by others. Their business activities are not confined to the Ottawa area; however, when they are carrying on business in Ottawa, they make use of existing theatre/auditorium facilities. Their method of operation is relatively straightforward.

12. The promoter rents the auditorium or “house” from the local owner, then organizes the event that is to be staged there. The promoter engages such stage employees as may be necessary to set up and tear down the production. The promoter will not normally have an established complement of its own employees. It hires the number and kinds of workers that it needs for a particular event, and when the show is over, those workers may all move on to something else. In this regard, the relationships are similar to those in the construction industry, where companies move from job to job, assembling their workforce as needed, and releasing the employees when the project is over.

13. A “unionized” promoter typically engages out-of-work union members - usually through a “hiring hall” arrangement in which the promoter specifies the number of workers needed, and the union refers the crew. The employees then set up the show in accordance with the instructions of the promoter. The promoter bears the responsibility for their wages, benefits, etc. And while the material before the Board is not entirely clear, it appears that this is the way the system works, whether or not the promoter signs a formal collective agreement with the union. In this industry, informal understandings and local area practice are both important determinants of behaviour.

14. CSA has entered into what it claims are collective agreements [this is challenged by IATSE] with MCA Concerts and Bass Clef. Those collective agreements set out the terms and conditions of employment for any CSA members employed by these promoters. CSA claims that, by virtue of these agreements, it should be the supplier of stagehand labour to Bass Clef and MCA whenever the promoters organize an event. However, the collective agreements read, in part:

This agreement shall not be in force if the productions are in a location covered by another collective agreement for the supply of labour, etc., unless the said agreement is waived in favour of the Canadian Stagehands Association.

15. It is this clause which the promoters claim relieves them of the obligation to use CSA members when the “house requirements” specify an alternative labour source. The promoters contend that if “the house” specifies the trades or trade union affiliation of the workers brought into its facility, the promoter is bound to abide by these limitations - that is why there is a clause in the collective agreement recognizing that CSA’s claim must give way to established local arrangements.

16. The promoters assert that the practice in the industry is to recognize the local trade practices and union affiliations associated with “the house”. The promoter abides by the rules established in the local area, and for the particular venue, in which the show is to take place. Thus, while there is no doubt that MCA Concerts and Bass Clef may be under *some* obligation to CSA to meet their labour requirements by hiring out-of-work CSA members, the extent of that obligation is a matter of debate. That is why the promoters submit that the issue should be submitted to arbitration.

17. CSA replies that whatever the agreements mean, they do not cover the situation here under review, or relieve the promoters of the obligation to employ out-of-work CSA members.

* * *

18. The City of Ottawa owns and operates Lansdowne Park, which is a recreation complex comprising a number of facilities, including an ice-skating arena known as the Civic Centre, a football stadium, and various other buildings. These facilities can be rented for trade shows, concerts, or other entertainment events. Promoters consider them desirable, and, for some kinds of production, there are no convenient alternatives.

19. When the City rents its facilities to a promoter, it does not hold itself out as "the employer" of individuals hired in connection with the show. Nor does the City assert any right of direction or control over employees. The City does not assume the burden of remuneration. Those arrangements remain the prerogative of the promoter and/or the entities with which the promoter may contract. But the City does purport to control the *trade union affiliation* of employees working on its premises, and it is that aspect of its commercial relationship with the promoter, that is central to the current controversy.

20. If a promoter wishes to use the City's facilities, it must enter into a rental agreement which the City describes as an "occupation permit". In addition to a rental fee, the standard form rental agreement contains the following condition:

It is understood and agreed by the Producer that where personnel are required to be engaged in event preparation, set up and tear down, to fulfill the duties under the following categories, then and in that event, all regulations set forth by the International Alliance of Theatrical Stage Employees Union shall be strictly complied with, excepting in any case any of the following classes employed by the City of Ottawa and covered by its collective bargaining agreement with the Ottawa-Carleton Public Employees Union, Local 503 - CUPE (CLC).

CATEGORIES

Electricians, Spot Light Operators, Carpenters, Property Men, Fly Men, Grips, Sound Men, Painters of Scenic, Artists, Recordist, BoomMan, Building or Construction of Scenery of Effects pertaining to Stage Presentations, or Filming, Recording, or Broadcasting of Stage Entertainment, Meetings, Conventions and Sports Events. (sic)

Unless the promoter is prepared to agree to this condition, it may not be able to rent the hall.

21. There is really no dispute about the impact of this provision: certain work on shows staged in the City facilities, is reserved for IATSE members. A promoter who wishes to use the City's building to stage a show, must agree to use IATSE members for that work. And that is so whether the promoter is "non-union" or has a relationship with some other union. From the perspective of IATSE and the City, a non-union promoter and a "non-IATSE promoter" are regarded in the same way.

22. IATSE has persuaded the City to grant IATSE members a preference in respect of particular kinds of work which the City "imposes upon" users of its facilities. In effect, the City, as owner, is regulating the trade union affiliation of persons seeking work in City buildings - even if those individuals are actually employed by someone else, and may prefer not to be members of a union, or members of IATSE.

23. The nature of IATSE's influence with the City may not be particularly relevant, save to note that no one alleges that it is the product of illegal conduct. However, it is important to note

that the preference for IATSE is not new: the City has had a long-standing working relationship with IATSE spanning more than twenty-five years. With the exception of a brief period in 1992, it has always been understood that “stagehand work” in City facilities will be done by IATSE members; moreover, that requirement has been adhered to by visiting promoters without controversy. Such promoters have never sought to operate “non-union”, or to obtain their stagehands from some other source.

24. On the other hand, there is no evidence that prior to the formation of the CSA, there was another local source of “unionized” stagehand labour - that is, another union in the Ottawa area in a position to acquire bargaining rights for stagehands, or require promoters to resort to its hiring hall to meet their labour requirements. IATSE was “the only game in town”; and therefore it is not surprising that there is a settled web of commercial arrangements that goes back many years. The question, though, is whether these established arrangements can prevail in face of the challenge from the new union.

25. It is also useful to note the structure of the controversial condition in the City’s rental arrangements.

26. The “IATSE condition” not only gives a preference to “IATSE stagehands”. It also provides a demarcation line between the functions that may be performed by IATSE members, and those which are to be performed by CUPE members in the City’s own employ. In other words, the rental arrangement not only gives IATSE members a preference in respect of particular kinds of work, it also settles the division of labour, or work jurisdiction, between IATSE and CUPE. Presumably, this is advantageous to the City both with respect to the operation of the facility, and with respect to its relationship with its own employees and their bargaining agent. Or at least that is the inference to be drawn from the longevity of the arrangement and its recent reaffirmation by Ottawa City Council.

27. There is no doubt that the City has decided, for its own reasons and in its own interest, that “stagehand work” within its facilities will be done by IATSE members in accordance with the historical practice in the Ottawa area. The City has also decided, for its own reasons and in its own interest, to impose that obligation upon any promoter wishing to use the City’s facilities. The material filed by the City indicates that this matter was debated by City Council in 1992, and after receiving submissions from interested parties and considering the business ramifications, City Council opted to reaffirm the established practice. City Council cited the “long and successful working relationship” with IATSE, the traditional IATSE work jurisdiction which had been recognized in these facilities, and the potential disturbance of the “harmonious relationship between IATSE and the Lansdowne Park” if a “promoter preference” practice were permitted. Council rescinded a “promoter preference” option which had existed for several months, and returned to a rental regime in which promoters were obliged to obtain their stagehands from IATSE. In summary then, after a brief period of flexibility, the City opted to return to settled arrangements, which had been in place for many years, and which, of course, pre-date both the existence of the CSA and any collective agreements upon which the CSA relies.

28. It is the City’s return to this form of rental agreement that CSA contends has precipitated the unlawful lock-out. The sequence of events is not contested.

* * *

29. In late 1992, MCA Concerts and Bass Clef wanted to stage productions in the Ottawa area. The Civic Centre was a desirable location for those events. But in order to use the facility,

the City, as owner, demanded a rental agreement in the form mentioned above. The rental agreement requires the promoters to use IATSE members for stagehand work.

30. CSA members hoped to obtain these work opportunities because of their [challenged] collective bargaining relationship with MCA Concerts and with Bass Clef. But they did not. Out-of-work CSA members were not employed for the events; and although the submissions do not specifically say so, I assume work went to IATSE members - that is, members of a trade union with which MCA Concerts and Bass Clef have no collective bargaining relationship.

31. CSA contends that this amounts to a "lock-out" of its members. In CSA's submission, there is no suggestion that its members do not have the skills to perform the work in dispute. There is no question about their availability. The problem is that they are members of "the wrong union".

32. CSA claims that the "message" to its members is that unless they oust CSA and join IATSE instead, Bass Clef, MCA Concerts, and other employers will not employ them at facilities owned by the City - potentially a large volume of work. CSA contends that the situation is designed to force its members to abandon their union and join IATSE.

III

33. Before addressing the narrow question which has been put to the Board for its determination, I think it may be useful to sketch in the broader collective bargaining perspective; for at the root of CSA's argument, is an assumed relationship between "trade union membership", "bargaining rights", "rights under the Act" and "work" which is neither grounded in nor supported by the statute. In particular, the statute does not create any general right to particular work, or to work in a particular place, and there are a number of legitimate arrangements which either link work opportunities to membership in a particular union or limit work opportunities because the employee is not a union member or belongs to the "wrong union". CSA members are understandably concerned that their choice of union has excluded them from certain work opportunities; but, as will be seen, their dilemma is not unusual, nor does their concern, in itself, provide a legal foundation for their claim.

34. The most common example of this "linkage" is a union security arrangement (see section 46 of the Act) which requires membership in a particular union as a condition of employment. If an individual wants access to the work that an employer provides, that person may have to join a particular union - whether or not s/he wants to do so. Union membership does not, in itself, guarantee employment, or continued employment, or any particular amount of work, but unless the individual joins the union, s/he may be excluded altogether. If a person is not prepared to join the union or is not already a member (in "hiring hall" closed-shop situations), s/he will not be employed. And, of course, if the union is not prepared to accept someone into membership, that too may exclude him/her from work opportunities that the union controls.

35. Closely akin to union security provisions are "sub-contracting arrangements" which either *prevent* the transfer of bargaining unit work to others, or *direct* that such work must go to members of the union party to the arrangement. In this latter form, the arrangement protects the membership of the union by channelling work only to *particular employers* who employ union members and not to non-union employers or employers whose employees are represented by another union. Such subcontracting conditions favour one group of unionized workers at the expense of others or non-union employees; and they do that by controlling the commercial relationship *between employers*. The union protects its members by defining or limiting the contractors with whom "its" employers can deal, and by encouraging "its" employers, to deal only with union-

ized businesses. Here, too, one might claim that “third parties” are “dictating” available work opportunities, but there is nothing illegal about that.

36. It is important to understand that a trade union’s attraction for its members lies not only in its ability to negotiate favourable wages or working conditions, but also in its ability to protect or enhance those members’ access to work. That is especially so where the work flow is erratic as it is in the construction industry or the entertainment business, and, not surprisingly, it is in this context that one encounters the most elaborate mechanisms to control work. The union seeks to prevent leakage of work to non-union firms or to firms represented by other unions. At the same time, it attempts to promote arrangements that direct work to “its” employer to the exclusion of non-union firms or firms with other union affiliations. (As I have already noted, from IATSE’s point of view, there is no distinction between a non-union promoter and one with a relationship with some other union.)

37. Work restrictions and commercial restraints of this kind are not necessarily illegal simply because they enhance one union’s control of work at the expense of another union or non-union employees. Nor does it matter that such devices might induce non-union employees or the members of less successful unions to abandon their previous preference in favour of a union that is better able to “deliver the bacon”. It may be improper for a trade union to use illegal economic pressure to achieve such restrictions, but the arrangements themselves are not per se illegal, and, in fact, are quite common.

38. The situation in *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022 provides a concrete illustration of the way in which such antecedent restrictions on work allocation can impinge upon subsidiary collective bargaining relationships. It also illustrates the care which must be exercised before concluding either that access to particular work is a “right protected by the Act”, or that such restrictions on workflow illegally “interfere” with the bargaining rights of a disfavoured union or the rights of employees who prefer to be non-union. Finally, it illustrates the way in which someone who owns or controls the site where work is done, can decide which firms will work at that location, and thus which group of workers will have access to those work opportunities.

39. In *Metropolitan Toronto Apartment Builders Association*, a group of general contractors got together with a group of local craft unions and decided that any work on the various projects which these contractors controlled, would be done exclusively by members of one or more of those unions. Among the unions in the group was Bricklayers Local 2 which claimed, and was promised, any “bricklayers work” at the various sites which the contractors controlled.

40. The essence of the arrangement was a restriction on tendering, so that only businesses with stipulated collective bargaining relationships could bid for, or perform, work on the projects controlled by the general contractors. The contractors promised that they would only enter into commercial agreements with construction companies that had acceptable collective bargaining relationships with the members of the union group. In addition, if the successful bidder chose not to do all of the work itself, it had to promise that any sub-contractor it engaged would likewise have an acceptable collective bargaining relationship with one of the unions in the group. The obligation to use a particular union was passed along down the contractual ladder.

41. These arrangements (we say “arrangements” because the Board did not decide whether they were part of a collective agreement) guaranteed that bricklayers’ work would always be done by Bricklayers Local 2 members, because in order to bid for work or be on the job site, a masonry contractor had to have a collective bargaining relationship with Bricklayers Local 2. But, of course, the arrangement also guaranteed Local 2’s work jurisdiction and presence on the job site to the

exclusion of other trade unions representing Bricklayers, the employers of bricklayers represented by other unions and non-union employers and employees in the masonry trade.

42. That is what prompted a challenge from Bricklayers *Local 1* - another Bricklayers union in the Toronto area that found itself excluded from job sites to which the arrangement applied. Local 1's challenge was supported by MCAT, the group of employers with which Local 1 had a collective bargaining relationship. The rival union and rival employers attacked the arrangement which excluded them from particular job sites.

43. Local 1 and MCAT argued that the general contractors were "dictating" the collective bargaining relationships of *other employers* on the site, and interfering with the bargaining rights of Bricklayers Local 1, whose members were excluded from the site and its work opportunities, because they had the "wrong union" affiliation. In Local 1's submission, its members were being told to join Local 2 or remain unemployed - they had to abandon their union in order to get work. Local 1 and MCAT claimed that this kind of "top down" influence on subsidiary collective bargaining relationships was contrary to the *Labour Relations Act*. However, the Board disagreed, writing, in part:

39. This Board concurs with the view that the primary purpose of the sub-contracting clause is to protect a union's claim to a particular work jurisdiction. Can it be said, then, that such provisions interfere with an employee's right to join a trade union of his choice, as protected by sections 58(c) and 61 of the Act? Although employees may be tempted to join a trade union which can provide them with work, this consideration is a recognized fact of life in the construction industry where trade unions have some control over the allocation of work through their hiring halls. The availability of work through a trade union will always operate as an inducement to employees to join a particular union, regardless of the presence of a sub-contracting arrangement. This kind of inducement, therefore, cannot constitute the kind of conduct contemplated by either section 58(c) or section 61 of the Act.

40. Nor can it be said that the sub-contracting clause interferes with another union's bargaining rights contrary to section 56 and 59 of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the *Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 of the Act for the resolution of jurisdictional disputes.

41. The MCAT attacked the sub-contracting clause on a somewhat different ground, arguing that the clause was illegal because it restricted the tendering procedure. According to the MCAT, it was particularly unfair that its members were being excluded from access to projects being financed by public money. While this concern of MCAT is quite understandable, it should be made clear that the supervision of tendering procedures is well beyond the jurisdiction of this tribunal. Our jurisdiction is to simply determine whether sub-contracting provisions, as such, violate any provision in the *Labour Relations Act*. The answer to this question is clearly no.

44. The fact that a commercial arrangement gives some employers with particular collective bargaining relationships preferred access to business (and therefore work opportunities for their employees), does not, in itself, amount to a violation of the *Labour Relations Act* or unlawful interference with "rights" protected by the Act - even though such firms may have a competitive advantage over others, and employees may be attracted to a trade union that is able to secure and

benefit from such arrangement. Indeed, it is quite common for an owner or a general contractor (i.e. an entity with the flexibility to decide with whom it will contract) to take into account the "union status" of the companies with whom it chooses to do business. Likewise, an industrial firm may prefer to do business with companies that have particular trade union presence (for example, by agreeing that repair work will only be done by outside contractors who use members of the "house-union"). The reasons for this are various, but ultimately reflect the business judgement of the owner or general contractor or industrial enterprise that it is in its interest to enter into such arrangements. No one has ever suggested that they are illegal merely because they prevent employers with *different* union affiliations from participating in the project or work; nor was the Board in *MTABA* prepared to tell one *employer* or owner which *other employer* it could contract with. The Board recognized that arrangements of this kind might give rise to a jurisdictional dispute, but the Board was not prepared to say that the arrangement was illegal - even though it was evident that work was being directed to Local 2 members in preference to members of Local 1, and the latter were claiming that they were "discriminated against" because they belonged to the "wrong union". The claim had rhetorical attraction, but it did not have a legal foundation.

45. The situation currently before me is not precisely the same as that before the Board in *MTABA*, but the case is useful because it illustrates that bargaining rights do not necessarily translate into a statutory claim or statutorily protected right to particular work; and there may be commercial limitations on work opportunities, linked to trade union affiliation, that do not amount to an unlawful interference with statutory rights.

IV

46. With that general background I turn to the narrow question that the parties have posed in this case: has the IATSE preference in the City's lease arrangement caused an unlawful lock-out of the promoters' employees, for which relief is available from the Board?

47. In answering that question, I think it is useful to consider the respondents separately.

48. The City has no collective bargaining relationship with CSA, and it seems clear that the City is not the employer of stagehands. It has neither refused to employ nor continue to employ such employees; nor does the City seek to "compel or induce" or "to aid another employer" to compel or induce its employees, to refrain from exercising rights under the Act, etc. The City is not applying pressure on stagehand employees - it has none; nor is it allied with or assisting or acting on behalf of the promoters to put pressure on the promoters' employees. The City is not the "agent" of the promoters, or acting on their behalf. The City, as property owner, for its own business reasons and in its own interest, is deciding with whom it will contract. The collateral impact on someone else's employees does not fall within the definition of a lock-out.

49. For the purpose of the "best case" argument, I will assume that the promoters chose not to hire out-of-work CSA members, and that this amounts to a failure to "continue to employ" employees within the meaning of the lock-out definition (although I note that "employ" and "continue to employ" are distinct concepts elsewhere in the Act, with only the latter appearing in the "lock-out" definition - c.f. section 67 of the Act). But the refusal to resort to the CSA hiring hall was not intended to compel or induce CSA members to forego rights under the Act. The fact is that there was no work available to CSA members at the Civic Centre, and they have no more valid claim to perform stagehands' work there, than they have in respect of other functions (janitorial work, say, or ticket sales, or running the lighting system) which the City may reserve to its own employees represented by CUPE, or channel to anyone else whom the City chooses to permit on its premises. In this situation the City has decided what work opportunities will be made available and to whom, and the promoters have no choice in the matter. The promoters cannot pass on or

withhold “work” to members of CSA, because of the conditions upon which business opportunities are handled to the promoters in the first place. They cannot employ CSA members because there is no work for them to do, and the City will not permit them on its premises to perform the functions they claim to be theirs. The actions of the promoters lack the intention required by the definition of “lock-out” (“... with a view to compel, etc. ...”).

50. There is no stipulation in the material before me of any direct communication between the promoters and potential employees designed to induce them to abandon their bargaining agent; and even if there were, I am not sure it would make any difference. Indeed, the CSA collective agreement seems to contemplate situations in which arrangements at “the house” may give preference to another union and relieve the promoters of any obligation to use CSA members. Whether or not the IATSE preference under review fits within the strict parameters of the CSA collective agreement, it is difficult for CSA to maintain that these extrinsic commercial arrangements are contrary to the statute, or, if engaged, result in a breach of the law. For if that were the case, it would not matter whether they were embedded in a collective agreement between the City and IATSE or, as appears to be the case, a long-standing policy to the same effect. In other words, the situation the CSA claims is unlawful appears to be specifically contemplated in its own collective agreement.

51. To the extent that there has been a “refusal to employ” CSA members, that refusal was not tainted by the improper motivation required by the definition of “lock-out”. The promoters were not using improper leverage to extract concessions from employees or potential employees, or to compel those individuals to forego statutory rights. The promoters were merely responding to the commercial situation in which they found themselves, and there is no suggestion whatsoever that there was ever any attempts to pressure employees to leave CSA. To the extent that IATSE’s size, reputation, contacts, or experience creates allies in the region, or collective bargaining advantages that a small new union does not have, that is simply a collective bargaining reality which CSA members must recognize. In this respect, their situation is no different from the members of Bricklayers Local 1 in the *MTABA* case mentioned above: they too found themselves excluded from worksites because of their choice of union. And that, the Board said, was a “fact of life”.

52. For the foregoing reasons, I am satisfied that the promoters’ decision not to hire CSA members does not, in the circumstances of this case, constitute an illegal lock-out within the meaning of the Act. However, even if the circumstances here did meet the technical requirements or a literal reading of the lock-out definition I would not be inclined to interfere with the terms upon which the City, as a property owner, contracts with another business - particularly where, as here, the City is merely maintaining a labour relations status quo which has operated satisfactorily for decades. Section 95 gives the Board a discretion to intervene, and I would not be inclined to exercise it here. For as the Board held in *Peter Kiewit*, [1991] OLRB Rep. July 881, where the essence of the dispute is a jurisdictional dispute, that is the mechanism which should be applied.

53. This is not to say that the members of CSA are entirely without remedy. If they can establish that the promoters have failed to comply with the terms of the collective agreement, they *may* well be able to obtain compensation. Similarly, (as counsel for MCA Concerts submits) the situation here *may* disclose a jurisdictional dispute for which a remedy might be sought under section 94 of the Act (although it might not be granted). However, in my view, there is no “illegal lock-out” for which relief is available against either the City or the promoters.

0066-93-R; 0067-93-R; 1016-93-U Teamsters Local Union No. 419, Applicant v. Browning-Ferris Industries Ltd., Responding Party

Certification - Constitutional Law - Unfair Labour Practice - Employer acting as common carrier engaged in haulage of waste - Employer transporting waste materials on regular and continuous basis to various locations in USA -Board accepting assertion that employer's labour relations falling exclusively within legislative competence of Parliament of Canada - Applications dismissed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

APPEARANCES: *N. L. Jesin*, *Jim O'Donnell* and *Doug Power* for the applicant; *Ray Werry* for the responding party.

DECISION OF THE BOARD; October 12, 1993

1. Board Files No. 0066-93-R and 0067-93-R are applications for certification and Board File No. 1016-93-U deals with a complaint pursuant to section 91 of the Ontario *Labour Relations Act* (the "Act").

2. The responding party, Browning-Ferris Industries Ltd. ("BFI") has raised an objection to the constitutional jurisdiction of this Board to deal with the applications for certification. The responding party submits that it is engaged in an international transportation business which connects Ontario to the United States within the meaning of section 92(10)(a) of the *British North America Act* (the "*B.N.A. Act*"). The responding party suggests therefore that its labour relations are exclusively within the legislative competence of the Parliament of Canada and cannot be regulated in that regard by the Ontario *Labour Relations Act*. Section 92(10)(a) provides as follows:

92. (10) Local Works and Undertakings other than such as are of the following Classes:-

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

...

3. BFI is a common carrier and is engaged in the haulage of waste. Waste is collected in the Toronto area and approximately 90% of it is hauled to various locations in the United States (the "U.S.A.") for disposal. However, some waste is disposed of in Ontario. BFI holds a licence from the Ministry of Transportation and the Ministry of the Environment which allows it to transport waste on a commercial basis in Ontario. BFI is also licensed to operate in New York State, Ohio, Pennsylvania, Delaware and Michigan.

4. BFI currently has contracts with the Municipality of Metropolitan Toronto, the City of York and the City of Etobicoke for the haulage of waste. Waste is brought in by truck to a transfer station, paper products are sorted out and baled and then all of the waste is loaded onto a long-haul transport truck. Approximately 15% of the waste is transported in BFI equipment, the remainder is transported by three other common carriers under contract with BFI. Employees of BFI transport waste to destinations in the U.S.A. on a daily basis. BFI employs 50-60 drivers and 3 of those drivers go to the U.S.A. daily. It is clear that BFI is in the business of collecting, hauling, handling and transporting waste.

5. BFI also has a contract with Dupont, under which it collects scrap materials from Dupont distributors in the Toronto area and hauls it to Delaware where it is reprocessed into reusable components. The evidence is not clear what percentage of its total business the Dupont contract makes up, but it is clear that materials are hauled on a regular basis for Dupont. BFI also has contracts to haul international waste, which is waste generated on airplane flights, from the airport and medical waste. The international waste has to be incinerated, and as there is currently no incinerator in Ontario, it has to be hauled to the United States. BFI hauls the medical waste and the international waste in its own vehicles.

6. The waste, while it is in transport, is still the responsibility of the generator. For this reason, the generators of the waste, who are the customers of BFI, want to ensure that the waste is picked up, transported and disposed of in an appropriate fashion. Although BFI normally makes the decision with regard to the disposal of the waste, legislation dictates that some of it must be disposed of in a certain fashion (i.e., the international waste) and occasionally the customer tells BFI where to dispose of the waste. The majority of the solid waste transported to the United States by BFI is disposed of in dump sites owned by BFI and other sites owned by another company that BFI is a part-owner of.

7. BFI is not engaged in industrial or sewage system cleaning, managing hazardous substances or handling environmental emergencies. It does not offer hazardous waste management programs, consulting services for the internal management of hazardous waste and in-house planning of emergency measures, nor does it provide services for restoring contaminated sites and recycling certain products. It is engaged in the operation of an international waste transportation and disposal business.

8. Counsel on behalf of BFI took the position that it was in the transportation business as its core undertaking is the transportation and haulage of waste. BFI is a common carrier and as such falls within the ambit of section 92(10)(a) of the *B.N.A. Act*. In anticipation of the applicant's argument that BFI "owned" the garbage and was as such transporting its own product, counsel reminded the Board that the generator of the garbage was responsible for it. Counsel suggested that nobody owns garbage as nobody wants it and it is not a product, but if anyone owned the garbage, it was the generator. Counsel also pointed to the Dupont contract as evidence that BFI was engaged as a common carrier, as in that situation Dupont never ceased to own the product BFI was transporting. Counsel referred the Board to *Ottor Freightways Limited*, [1975] OLRB Rep. Jan. 1, *Keytours Inc.*, [1986] OLRB Rep. July 979, *Ottawa-Carleton Regional Transit Commission v. Amalgamated Transit Union Local 279, et al*, (1983) 84 CLLC 1225, *Re Tank Truck Transport Limited*, 25 D.L.R. (2d) 161, and *Liquid Cargo Lines Limited*, (1965) 1 O.R. 84 in support of his contention that the case before us falls under federal jurisdiction.

9. Counsel for the applicant, Teamsters Local Union No. 419 ("the union") argued that BFI was a waste management company and a local undertaking. Counsel argued that just because BFI transports waste across the border does not change it from being a waste management company. Although BFI is a common carrier, they are not told by the customer where to deliver "the goods", and once BFI picks up the product it is BFI's responsibility to deal with it. Counsel referred the Board to *Humpty Dumpty Foods Limited*, [1979] OLRB Rep. Apr. 315, *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083, and *Catalano Produce Limited*, [1975] OLRB Rep. Oct. 743 in support of his argument that BFI was like a multi-national company transporting its own product, as in this case they take their waste to their facilities or dump sites. Counsel pointed out that normally a customer owns a product at both ends and the common carrier just moves it. In this case, the customer never wants to see it again and BFI keeps the waste. Therefore, counsel took the position that BFI is a local work that happens to have a transportation aspect. In counsel's

opinion, the core of the business is the management and disposal of waste and the transportation of it is just one part. Counsel asked the Board to find that BFI is in the waste management business, a local activity, and not in the transportation business. In support of his argument that BFI was a waste management company and that it was a local undertaking, counsel referred the Board to a Canada Labour Relations Board case, *The Syndicat Sani Mobile Outaouais and Sani Mobile S.V.O. Inc.*, [1991] 2 Can. LRBR 125. In conclusion, counsel suggested that the Board should hear this case as it falls within our constitutional jurisdiction.

10. In addition to the cases already noted, counsel for the union referred the Board to *Fleetwide*, [1986] OLRB Rep. Sept. 1216, *Westburne Industrial Enterprises Limited*, [1984] OLRB Rep. Oct. 1525, and *Etna Foods of Windsor Limited*, [1987] OLRB Rep. Feb. 210.

11. Cases of this nature must by necessity turn on the facts peculiar to each case. After having carefully reviewed the evidence and the submissions of counsel, we conclude that BFI is in essence a transportation company engaged in the trucking of waste or recyclable materials from points in Ontario to points in the United States. Nothing turns on whether or not the business of BFI is characterized as "waste management". However, what is crucial to our determination is an assessment of what business BFI is actually engaged in. The label applied to it is not important. In the *Sani Mobile* case, *supra*, the Canada Labour Relations Board concluded that the purpose of the company in question was to offer services for managing and cleaning industrial waste and sewer systems and handling environmental emergencies. In the Board's opinion in that case, any transportation activities engaged in by Sani Mobile were subsidiary to its other normal and habitual activities. Although Sani Mobile was characterized as a waste management company and the same label could be applied to BFI, clearly the two companies are engaged in different aspects of the waste management business. The primary function of BFI is the transportation of waste materials.

12. It is helpful at this point to refer to the Board's comments in the *Dominion Dairies Limited* case, [1978] OLRB Rep. Dec. 1083:

5. This Board can only exercise jurisdiction which is lawfully conferred upon it by the Legislature. *Prima facie* labour relations fall within the legislative competence of the province as being within the enumerated jurisdictional head of property and civil rights within section 92(13) of the *British North America Act*. (*Toronto Electric Commissioners v. Snider* [1925] 2 D.L.R. 5 (P.C.)). The labour relations of any federal work, undertaking or business are, however, within the exclusive jurisdiction of the Parliament of Canada and are regulated under section 108 of the Canada Labour Code (R.S.C. 1970, c.L-1, re-enacted by S.C. 1972, c. 18, s.1). The heading of federal undertakings material to this application is found in section 92(10)(a) of the *British North America Act* which provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,-

10. Local Works and Undertakings other than such as are of the following Classes:-

- (a) Lines of Steam and other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

That section of the *British North America Act* and its interpretation by the courts require the Board to carefully examine the nature of the business or undertaking engaged in by the respondent. If the respondent's business is within the definition of section 92(10)(a) of the *BNA Act* then its labour relations are exclusively regulated under the Canada Labour Code.

6. The words of section 92(10)(a) have been interpreted as applying only to "means of inter-provincial communications" (*C.P.R. v. Attorney-General of British Columbia* [1950] 1 D.L.R. 721 (P.C.)). The fact that a business extends beyond a province will not mean that the operations of

such a business will come within federal jurisdiction unless the business involves transportation or communication. In the *C.P.R.* case (*supra*), Lord Reid stated:

“There are many companies beside the appellant whose businesses extend over all or most of the Provinces. It was not and could not be suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies.” (p.727).

7. When a company carries on a single undertaking which is fairly characterized as inter-provincial communications or transportation it is well settled that its activities are regulated by federal jurisdiction within section 92(10)(a) of the British North America Act, (*Attorney-General of Ontario v. Winner* [1954] A.C. 541 (P.C.)). The characterization of the undertaking is not, of course, an “all or nothing” proposition. The courts have recognized that a company may be engaged in more than one undertaking and that certain aspects of its business may be regulated federally while other aspects fall within provincial jurisdiction. In the *C.P.R.* case the Judicial Committee of the Privy Council determined that although the Empress Hotel in Victoria was owned and operated by the Canadian Pacific Railway, the operation of the hotel was sufficiently distinct and unrelated to the corporation’s railroading endeavours as to be subject to provincial regulation of the hours of work of the hotel’s employees. Counsel for the respondent submits that the severability doctrine enunciated in the *C.P.R.* case applies in the instant case. He argues that the trucking and delivery component of the respondent’s business are sufficiently separate from its manufacturing activity that the labour relations of employees engaged in trucking and delivery are exclusively within federal jurisdiction.

8. In the past this Board has been required to determine whether a manufacturing operation with trucking facilities would be held to be one undertaking and, if so, whether it would be subject to provincial or federal regulation. When a company operates as a common carrier and its business takes it beyond provincial boundaries its labour relations are exclusively under federal jurisdiction. (*Re Tank Truck Transport Ltd.* (1960) 25 D.L.R. (2d) 161 (Ont. H. Ct.)). Where, however, a company is not a common carrier and the essence of its business is manufacturing or processing, the undertaking is within the constitutional jurisdiction of the province for the purposes of regulating its labour relations, notwithstanding that the goods manufactured or processed by the company are sometimes sold outside the province and that the company’s delivery facilities extend that far. In other words, where the activity is essentially one of manufacturing and where the manufacture and delivery of goods are integrated activities which are part and parcel of the company’s total undertaking, the labour relations of all employees of the company fall within provincial jurisdiction. (*Wm. R. Barnes Company, Ltd.* [1967] OLRB Rep. Sept. 566; *Domtar Limited Trucking Division* [1970] OLRB Rep. July 495; *Crane Carrier Canada Limited* [1970] OLRB Rep. Sept. 665; *Compagnie Miron Ltee.* [1972] OLRB Rep. Dec. 1034 and [1973] OLRB Rep. Jan. 61; *Mason Windows Limited* [1973] OLRB Rep. Oct. 547; *F.B.I. Foods Ltd.* [1975] OLRB Rep. June 522; *Catalano Produce Ltd.* [1975] OLRB Rep. Oct. 743). In the instant case, therefore, the issue is whether the trucking and delivery aspect of the respondent’s business is sufficiently integrated with its food processing activity as to form part of one undertaking or whether it is severable from the manufacturing component so as to be subject to federal regulation.

13. We cannot accept counsel for the union’s argument that simply because BFI disposes of the waste material on dump sites that it owns, that this brings it in line with those cases in which the Board found that the business in question was not transportation as the business consisted of the transportation of the company’s own products and goods (see *Humpty Dumpty*, *supra*, *Catalano Produce*, *supra*, and *Dominion Dairies*, *supra*). For economic reasons, BFI disposes of the waste on sites that it owns. It is under no obligation to do so. There is no evidence to support a conclusion that the part of BFI which is the subject of these applications for certification is in the waste disposal business. In addition, the evidence is clear that the generator of the garbage, generally BFI’s clients, are responsible for it. Thus, BFI is transporting materials which are the responsibility of their clients. The cases referred to (*Humpty Dumpty Foods*, *supra*, *Dominion Dairies*, *supra*, and *Catalano Produce*, *supra*) are distinguishable on this basis. However, even if we were to

conclude that BFI “owned” the waste it transports, clearly in its contract with Dupont, BFI is acting as a common carrier and is transporting goods on behalf of another company.

14. There are two grounds upon which an undertaking may be found to be a federal one pursuant to section 92(10)(a) of the *B.N.A. Act*. These two approaches are summarized as follows in the *Ottawa-Carleton Regional Transit Commission* case (*supra*):

There seems to be two lines of cases which have considered this section. The first are those cases in which the undertaking before the court carried on a business within the transportation industry with operations extending into another province or connecting with another province. The courts in those cases were dealing with trucking firms, bus lines and railways. See, for example, *Attorney General for Ontario et al v. Winner et al.*, [1954] A.C. 541 (P.C.); *Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497; *aff'd* [1963] O.R. 272; *Regina v. Cooksville Magistrates Court; Ex Parte Liquid Cargo Lines Ltd.*, [65 CLLC ¶16,023] [1965] 1 O.R. 84. It is this line of authorities which should direct the result in this case.

The second line of cases which have considered this head of s. 92 are those in which the court was required to determine the essential nature of an operation or undertaking. These cases, for the most part, evolved from a situation where a federal undertaking required the services of an entity which was purely local or provincial in nature in order to carry out certain aspects of its operations within the province. Examples of this line of case are *Montcalm Construction, supra*, *Northern Telecom Ltd. v. Communications Workers of Canada et al*, [79 CLLC ¶14,121] [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 and *Northern Telecom Canada Ltd. et al v. Communications Workers of Canada et al*, [83 CLLC ¶14,048] (1983), 147 D.L.R. (3d) 1 (S.C.C.).

In the case before us, the first approach was the one relied upon by BFI.

15. The test to be utilized to determine whether or not a particular business is one which falls within section 92(10)(a) was set out in the *Ottawa-Carleton Regional Transit Commission* case, *supra*. After making the observation that labour relations is *prima facie* within the jurisdiction of the provincial legislatures, the Court went on to say that in assessing whether or not a business fell within section 92(10)(a) and was to be federally regulated, that the crucial issue was whether or not the undertaking “connects Ontario with any other province or extends beyond the provincial limits of Ontario in such a way as to fall within the section”. The Court also went on to reject a quantitative approach (i.e., one which relies upon an assessment of the percentage of the business that is extra-provincial) and stated:

In my view the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extra-provincial business.

Thus, the key issues to be determined are whether the responding party’s business (regardless of what it is called) is an undertaking connecting the province with points outside the province and, if so, whether that extra-provincial “connecting” is done on a continuous and regular basis. The percentage of the such extra-provincial activity is not relevant in that a quantitative approach has been rejected by the courts (as set out above) and this Board (see the *Otter Transport* case and *Keytours* case, *supra*).

16. As already noted, BFI is a common carrier whose core or primary function is to transport waste materials. The evidence is clear that on a regular and continuous basis, it transports waste materials for several cities and municipalities and recyclable materials for Dupont to destinations in the U.S.A. It is not clear what percentage of its total business this involves, but it is clear that it is done on a regular and continuous basis. Having reached these conclusions, there is no reason to deviate from the long line of cases which have found that companies engaged as common carriers in an undertaking which connects the Province of Ontario with other provinces or coun-

tries, fall within federal jurisdiction (see *Otter Freightways Limited*, *Ottawa-Carleton Regional Transit Commission*, and the cases referred to in those decisions).

17. Accordingly, the applications for certification and the unfair labour practice complaint are dismissed.

18. There is one further matter which must be dealt with. The applicant, by letter dated July 20, 1993 wrote to the Board, enclosing further documentary evidence which it sought to put before the Board. There is no reason to believe that this evidence could not have been available, with the exercise of due diligence, and provided to the Board at the hearing on July 7, 1993. Counsel for the responding party has objected to the Board considering the document provided and suggests that the actions of counsel, in submitting the document, are improper. We are not prepared to take the document provided to us by counsel for the applicant into consideration. It could and should have been made available at the hearing and properly submitted into evidence. This was not done and we are not prepared to reopen the hearing to consider it.

1498-93-R; 1496-93-U Canadian Union of Public Employees, Applicant v. Carleton University Students' Association Inc., Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Intimidation and Coercion - Remedies - Unfair Labour Practice - Board finding that employer embarked on scheme of harassment and intimidation of union organizers and supporters and accepting that termination of certain employees motivated by involvement in union organizing campaign - Board satisfied that, as result of employer violations of the *Act*, true wishes of employees unlikely to be ascertained - Board regarding it as unnecessary to consider whether or not union having adequate membership support for collective bargaining, in view of clear direction to the Board in legislature's amendment of section 9.2 of the *Act* - Certificate issuing

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

APPEARANCES: *Michael Church*, *Robert A. Centa*, *J. W. Ross*, *Renée Twaddle*, *Peter Nogalo* and *Fouad P. Kanaan* for the applicant; *Stephen Bird* and *Lucy Watson* for the responding party.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; October 29, 1993

1. This is an application under section 91 of the *Labour Relations Act*, as well as an application for certification seeking relief under section 9.2 of the *Act*. The applicant, Canadian Union of Public Employees (hereafter referred to as the "union") requested an expedited hearing of its section 91 application under section 92.2 of the *Act*. The application for certification and the application under section 91 were heard together on August 23, 24, 25, 26 and 31. The Board rendered a decision on September 2, 1993 in which it found, without reasons, that the responding party had violated the *Labour Relations Act* by discharging *Renée Twaddle* and *John Wayne Ross*. Board Member *Correll* concurred with that result but dissents with respect to the application of section 9.2 relief in these circumstances. Following is our decision with respect to the certification application, as well as the reasons for our determination that the responding party has violated sections 65, 67 and 71 of the *Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Section 9.2 of the *Labour Relations Act* provides as follows:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

On the first day of hearing, as a preliminary matter, the parties raised the issue of who bears the onus of proof under this section. We directed the responding party to proceed first on both applications, and advised the parties that the issue of onus would be determined by the Board at the end of the day in the event that the evidence was so evenly weighted that a determination as to which party bore the onus became dispositive. However, the majority of this panel of the Board has found that the evidence clearly establishes that the responding party violated the *Labour Relations Act* and that a certificate under section 9.2 of the Act should issue. It is therefore unnecessary for us to determine who bears the onus of proof in this situation. (See *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745.)

4. The responding party elected not to call any witnesses on its own behalf, although it did cross-examine witnesses called by the applicant. The applicant called John Wayne Ross, Renée Twaddle, Fouad Kanaan and Stacy Fietz as witnesses. We found all of the witnesses to be credible, and as no contradictory evidence has been introduced by the responding party, we have accepted their testimony. On the basis of the evidence, therefore, we make the following factual findings.

5. Carleton University Students' Association Inc. (hereafter referred to as "CUSA") is an organization funded by student fees, which is responsible for providing services to students at Carleton University. CUSA has an existing collective agreement with CUPE Local 3011 for its permanent employees. It also employs a number of other people for terms of one year and it is these employees for whom the applicant is seeking certification in this matter. The parties have agreed on a description of the bargaining unit as follows: "all employees of Carleton University Students' Association Inc. in the City of Ottawa, save and except Department Heads, persons above the rank of Department Head and employees in bargaining units for which any trade union held bargaining rights as of August 5, 1993, and pending resolution of the Board, excluding as well Brenda Kennedy, classified as the Foot Patrol Coordinator".

6. There were approximately 50 members of the bargaining unit as of the date of application. The bargaining unit includes, among others, the co-ordinators of various student services, employees of the store, bars and cafeterias and student security staff. It is our understanding that most, if not all, of the members of the bargaining unit work in the student centre called the "Uni-centre". Renée Twaddle and Fouad Kanaan were service co-ordinators who reported to the Director of Services, Theresa Cowan. Ms. Twaddle was the Co-ordinator of the Women's Centre and Mr. Kanaan was the Volunteer Bureau Co-ordinator. Mr. Ross was the Co-ordinator of the Student Academic Action Bureau ("SAAB") and reported to Gary Anandasangaree, Director of Academics. All three of these witnesses began their one-year terms in these positions at the beginning of May, 1993. All were required to compete for their positions.

7. Shortly after becoming employed by CUSA, Ms. Twaddle and Mr. Ross decided to explore the possibility of unionization. Their approach was to begin by determining whether there was support for the idea among the other service co-ordinators by holding a number of meetings in the Women's Centre. These meetings were attended by six people who the witnesses referred to as

the “core group”. It included Ms. Twaddle, Mr. Kanaan, Mr. Ross and three other co-ordinators. At or around the same time, Mr. Ross and Ms. Twaddle were also meeting with representatives from the existing CUPE local and the national office. The CUPE representatives advised Ms. Twaddle and Mr. Ross that previous unionization attempts for this group had been unsuccessful. They were advised that they should move cautiously and be careful who they spoke to about it.

8. Mr. Ross and Ms. Twaddle also contacted employees in the store operation run by CUSA, the food service operations called “Roosters” and the security staff. These contacts were of a very preliminary nature, but both witnesses testified that the response they received was favourable. Towards the end of May the core group decided to search for further support for the union and invited the two service co-ordinators from the Carleton Disability Awareness Centre (“CDAC”) to attend their meetings. One of the CDAC co-ordinators attended two meetings with the core group with respect to the union. The evidence of the witnesses was that the response of the CDAC co-ordinators was initially positive. However, on June 2 the CDAC co-ordinators circulated a letter to all the service co-ordinators and, the witnesses believed, to Theresa Cowan, indicating that they did not support the union.

9. On May 26, a few days before the letter from the CDAC co-ordinators was circulated, the service co-ordinators were all required by the responding party to relinquish their keys to the CUSA offices. The witnesses testified that it was their understanding that service co-ordinators had always had these keys and had had access to the CUSA offices in the past.

10. On June 9 the service co-ordinators were requested to attend a meeting with the responding party. Present at that meeting were the President of CUSA, Lucy Watson, Theresa Cowan, Gary Anandasangaree, Mr. Ross, Ms. Twaddle, the other service co-ordinators and Brenda Kennedy, the Foot Patrol Co-ordinator. None of the witnesses were given any information as to what the meeting was to be about and no agenda was circulated either before or at the time of the meeting. Ms. Cowan opened the meeting by indicating that she wished to discuss the problems between the centres, the CUSA executive and the co-ordinators. However, shortly into the meeting, the president stated that she wanted to know “about the union and the letter”. Ms. Cowan subsequently remarked that the union organization was exclusionary, as not all service centres had been included. Ms. Watson then advised the attendees that the union should not be discussed during office hours as that would result in some of the centres being closed during those times. She persisted that she wanted to discuss the union and wanted to discuss where the “letter” came from. We accept that the letter she was referring to was the letter circulated by the CDAC service co-ordinators. The issue of the union was raised by members of management a number of times during the meeting. At one point, the following discussion ensued according to minutes submitted by the applicant which were not challenged by the responding party:

Ms. Cowan: “Unionizing usually involves financial problems like co-ordinators’ salaries and service budgets. If you are negotiating for finances, you should know right now that CUSA won’t be able to financially uphold all eight services”.

Ms. Twaddle: “Does this mean that CUSA will shut some of our services down?”

Mr. Anandasangaree: “I don’t think that we’re prepared at this time to make that statement”.

Ms. Cowan: “No comment at this time, but you should know that”.

Ms. Watson: “Does the steering committee know that Brenda’s involved in this?”

(The “Brenda” referred to is the Foot Patrol Co-ordinator, who the responding party has challenged as being a member of the bargaining unit). No one responded to that query and Ms. Watson then asked:

"And Wayne, you are not a service centre. Are you involved?"

Mr. Ross indicated he did not know, and Ms. Watson queried again:

"Who is involved then?"

The service co-ordinators agreed that they would not use office hours to have union meetings. There was a brief discussion about the fact that keys had been taken from the co-ordinators, and the meeting was adjourned.

11. Mr. Ross testified that subsequent to this meeting the organization drive slowed down, although he did get union cards from CUPE and had some signed on June 10. He acknowledged that his own attempts to organize the union slowed down at this time because he and the other co-ordinators were concerned about their positions. Both Mr. Ross and Ms. Twaddle testified that one of the members of the core group started to withdraw his support immediately after the June 19 meeting. Furthermore, service co-ordinators who had not previously been approached about the union were angry that they had learned about the campaign from management in such a fashion. Mr. Ross testified, however, that the organization drive was still proceeding, albeit more slowly and cautiously.

12. On July 14 a lock was installed in the door between Mr. Ross and Ms. Kennedy's offices and Mr. Ross was advised that the door was to be kept closed. The door between these offices had previously been kept open for air circulation. Mr. Ross had not been informed that a lock was to be installed on these doors, and he discussed the matter with his supervisor Mr. Anandasangaree. Later that afternoon, Ms. Watson and Mr. Anandasangaree met with Mr. Ross and Ms. Kennedy in Mr. Ross' office. It appears that Ms. Watson left that meeting quite angrily, and fifteen minutes later Mr. Anandasangaree called Mr. Ross and advised him that he wished to meet with him the following day at 3:30. When Mr. Ross asked what the purpose of the meeting was, Mr. Anandasangaree indicated it was to review work and that only the two of them would be present. On July 15 at 3:30 Mr. Ross went to see Mr. Anandasangaree and was ushered instead into Ms. Watson's office where he was handed a letter. The letter was a notice of immediate termination. No explanation was offered to Mr. Ross except a vague suggestion that his work was inadequate. Mr. Ross had received no previous letters of warning or discipline.

13. Earlier on July 15, Mr. Ross and Ms. Twaddle were on the bus with the core group member whose support for the union had diminished after the meeting of June 9. Mr. Ross told this co-ordinator that he had a union card if he wished to sign it. The co-ordinator advised that he was uncertain as to whether he wished to sign and that he wished to speak to his lawyer before he did. He indicated a concern with respect to the effect signing a card would have on his employment status. At the end of the day after Mr. Ross was fired, he and Ms. Twaddle went to see the co-ordinator, who advised that he did not wish to sign a union card. He stated he did not wish to "end up like" Mr. Ross. Harsh words were exchanged between Ms. Twaddle and the co-ordinator during this interaction.

14. Mr. Ross was reinstated on an interim basis, without prejudice, as a result of a settlement of an application by the applicant for interim relief. His reinstatement was then confirmed by this panel in its September 2 decision. Mr. Ross testified that since his return to the workplace, some of the people he originally approached in the CUSA store and Roosters have responded to him with an air of hesitation. He also advised that the service co-ordinator who had formerly been a member of the core group told him that he was concerned about being seen with him because it could cause problems for the co-ordinator in the workplace. Since his reinstatement, Mr. Ross has been hesitant to approach any other employees with respect to unionization because he has now

been identified as a union organizer, and he believes that being seen with him may put those employees in jeopardy.

15. Immediately upon his return to the workplace, Mr. Ross received a letter from his supervisor containing "guidelines" of work he was to accomplish upon his return. The letter required him to attend a meeting with his supervisor on August 12. However, as a result of telephone contact between counsel, Mr. Ross was not required to attend this meeting.

16. On Thursday, August 19 Mr. Ross requested permission to be absent from work for the purpose of attending the Board hearing. He had not received an answer by the end of that day and therefore the applicant caused a summons to be issued for him. The following day, he received notification from the responding party that he could attend the hearing, either as a leave of absence without pay, or that he would be paid but would have to make up the time later on in the year.

17. We also heard evidence that a document shredder was installed in the CUSA office after the reinstatement of Ms. Twaddle and Mr. Ross in August.

18. As co-ordinator of the Women's Centre Ms. Twaddle reports as an employee to the CUSA executive. However, she also reports to the Women's Centre collective and acts as a liaison between the collective and the CUSA executive. Ms. Twaddle was one of the union organizers and one of the people who originally contacted CUPE. Most of the original union organization meetings were held in her office at the Women's Centre.

19. On May 27 Ms. Twaddle received a letter of reprimand from the CUSA President, Lucy Watson. This letter referred to an incident in which Ms. Twaddle had, during an "emergency response" organization meeting, criticized a member of the University administration. Her criticism had been directed to the way the administration member had handled an incident the year before in which the University had received death threats with respect to approximately 20 members of the female student body, whose pictures and student numbers had been stolen.

20. During the same week of May 27 Theresa Cowan requested individual meetings with the service co-ordinators who reported to her. Ms. Twaddle met with her on June 1. During this meeting, Ms. Cowan advised Ms. Twaddle that she knew that secret meetings were being held and that Ms. Twaddle was a ringleader. Ms. Cowan wanted to know what the meetings were about. Ms. Twaddle responded that she did not know what Ms. Cowan was talking about. Ms. Cowan became critical of Ms. Twaddle's "attitude" and called her a derogatory name. Shortly after that meeting, Ms. Twaddle found a note with an apology and a bag of candies from Ms. Cowan on her desk.

21. On July 7 Ms. Cowan called another meeting with the service co-ordinators and accused Ms. Twaddle of holding secret meetings in the Women's Centre. Ms. Twaddle denied that any secret meetings had been held since the June 9 meeting, although some of the service co-ordinators had been in her office for twenty minutes the week before. Ms. Cowan was able to name the people who had been in Ms. Twaddle's office the week before. Ms. Twaddle testified that she found this meeting intimidating, as it indicated that she was being watched.

22. On the morning of July 8 Ms. Twaddle found that someone had been in the file which contains all of her CUSA documentation, memos, correspondence, etc. She did not review the whole file at that time, but on July 12 she did and found that someone had taken the note with the apology that Ms. Cowan had given her. Whoever had been in the file had also removed a joke about Ms. Cowan which had been written by a co-worker and placed that piece of paper on the top

of the file. On the morning of July 8, Ms. Twaddle had also found a note from Ms. Cowan on the bulletin board in her office requesting that they meet that day at 2:00 p.m. Ms. Watson, Ms. Cowan and other CUSA executive members have keys to Ms. Twaddle's office. Members of the collective also have access to a key.

23. Ms. Cowan came to Ms. Twaddle's office on July 15 and asked if anything was missing from her office as she had been advised by Mr. Kanaan that some of his files were missing. Ms. Twaddle confirmed that something was missing and the next day Ms. Cowan, Ms. Watson and a security guard attended in Ms. Twaddle's office and she made a report. The guard asked Ms. Twaddle whether she suspected anyone and she denied that she did. However, later the guard advised her that Ms. Cowan and Ms. Watson would not have access to her report. Ms. Twaddle then advised the security guard that she suspected Ms. Cowan.

24. Ms. Watson and Ms. Cowan both attended a meeting with Ms. Twaddle on July 8. Another member of the CUSA administration, Kelly Maunce, was also present at the meeting and was taking minutes, as was a member of the Women's Centre collective, Rudelle Paul, who attended at the invitation of Ms. Twaddle. Ms. Paul also took minutes. Ms. Twaddle was handed a letter which included a number of criticisms about her "attitude". The letter indicated that if her attitude and performance had not noticeably improved by July 29, her employment would be terminated. Ms. Cowan alleged that complaints had been made about Ms. Twaddle by members of the CUSA administration. Neither Ms. Cowan nor Ms. Watson would disclose any details with respect to the alleged complaints. Ms. Cowan again called Ms. Twaddle a ringleader and accused her of instigating problems with the other CUSA co-ordinators. Ms. Twaddle understood the reference to her being a ringleader to be referring to her participation in the unionization drive, since the last time the term had been used it was with respect to the union meetings. Ms. Cowan again accused Ms. Twaddle of holding closed-door meetings in the Women's Centre. Ms. Twaddle denied such meetings had been held since June 9. Ms. Twaddle suggested that a mediator be used to assist in the relationship between herself and Ms. Cowan. Ms. Cowan indicated that she did not think she would have time for mediation but that she would get back to Ms. Twaddle about it. Ms. Cowan later advised Ms. Twaddle that she was not prepared to engage in mediation with her. Ms. Watson advised Ms. Twaddle that she was prohibited from disclosing what had gone on in the meeting to anyone. Ms. Cowan said that if anyone came to them to defend Ms. Twaddle or to criticize Ms. Watson or herself about the meeting, repercussions would be severe. It was then agreed that Ms. Twaddle could report the meeting to the collective, but to no one else.

25. On July 8 Ms. Twaddle wrote a letter to Ms. Watson and Ms. Cowan thanking them for the "feedback" she had received at the meeting, assuring them that she was endeavouring to achieve the results desired by them, and requesting written guidelines with specifics as to her lack of performance and improvements needed. No guidelines were ever forwarded to Ms. Twaddle by Ms. Cowan or Ms. Watson. We accept that the letter of July 8 was an attempt by Ms. Twaddle to defuse the situation out of fear for her job.

26. Ms. Twaddle did not discuss the meeting with the other members of the core group for a number of days. She found this isolation and silence extremely upsetting and several days later, did tell them what had occurred.

27. After the meeting of July 8 and Mr. Ross' termination, Ms. Twaddle did not have much contact with other co-ordinators or co-workers as she was concerned that her own termination would follow. Ms. Twaddle did, however, speak to Ms. Fietz about signing a union card. Ms. Fietz advised that she was afraid to sign a card after what had happened to Mr. Ross. Ms. Twaddle also spoke to one of the secretaries (who she did not name) who indicated she would be in favour of a

union but that she would not sign a card for fear of being found out. The same secretary would no longer eat with Ms. Twaddle or the other members of the core group because she was afraid of being seen with them. Several other co-ordinators would also no longer eat with the core group. The organizing drive was effectively shut down since Mr. Ross was no longer in the workplace and Ms. Twaddle was too intimidated to continue, and potential members were, in any case, too intimidated to participate.

28. Ms. Twaddle and Ms. Fietz testified that Mr. Ross' termination was widely known throughout the Unicentre. They both testified that everyone was talking about it, that an article mentioning it was in the student newspaper, and that it was also mentioned on the student radio station. Ms. Twaddle testified that many people asked her if Mr. Ross was fired because they were attempting to unionize and that she advised them that that is what she believed. The issue was also raised in a CUSA council meeting but the council went in camera to discuss the actual circumstances surrounding Mr. Ross' termination. Ms. Twaddle testified that someone from Roosters, someone from the store, as well as one of the secretaries asked her about Mr. Ross' termination.

29. Ms. Twaddle requested a meeting with Ms. Cowan on July 20 to discuss what Ms. Twaddle hoped would be perceived as an improvement in her performance and attitude. At this meeting, Ms. Cowan advised that she did not recall that Ms. Twaddle had requested written guidelines. She also refused to engage in mediation with her. Ms. Cowan told Ms. Twaddle that she had received further complaints which she refused to disclose. Ms. Twaddle was informed that she had made no improvement whatsoever, and that she only had until "the following week", which Ms. Twaddle understood to mean she would be terminated the following week. At this meeting, Ms. Twaddle asked Ms. Cowan whether her threat with respect to "the following week" was because of the union. Ms. Cowan denied it and stated that she would be in favour of unionization if she thought it would help the student services.

30. Ms. Twaddle had advised the members of the collective with respect to what was going on with CUSA. As a result, members of the collective sent letters supporting her to the CUSA executive.

31. On July 29 at 3:30 Ms. Twaddle was called to a meeting with Ms. Watson and Ms. Cowan. She was required to wait until a lawyer for CUSA arrived. She was not expecting a lawyer to be present. The lawyer arrived at 3:40, and turned on a recording device which she put in her briefcase as she walked into the meeting. The Finance Commissioner, Rene Faucher, was in attendance at the meeting, as was Kelly Maunce, and a member of the Women's Centre collective who attended with Ms. Twaddle. Ms. Watson was on vacation and did not attend the meeting, although Ms. Cowan did. Ms. Twaddle was handed a letter of immediate termination which contained no reasons. She therefore asked a number of times why she was being fired. The CUSA lawyer answered repeatedly that her termination was at the employer's discretion and refused to provide any reasons.

32. Ms. Twaddle continued to come into the office for the next few days. She stated that she did not wish the Women's Centre to fall apart and that she was still a collective member and therefore entitled to attend the Centre and do whatever the collective wished her to do. However, Ms. Cowan ordered her to leave the office. At first Ms. Twaddle refused and then agreed to leave when Ms. Cowan said she wanted to take an inventory at the office to see if anything was missing. Ms. Twaddle did not return until she was reinstated.

33. Ms. Twaddle spoke to Ms. Stacy Fietz the day after her termination. Ms. Fietz advised that because of Ms. Twaddle's termination she did not wish to sign a union card. Ms. Twaddle testified that since her reinstatement a lot of workers would not talk to her or even say "Hi" to her,

some would not eat lunch with her, some have told her they did not want to be seen with her and others have told her privately they want to remain friends but do not want to be involved.

34. Ms. Twaddle requested a leave of absence to attend the hearing on August 17. She had not received a response by August 19 and therefore counsel for the applicant faxed summonses for herself and Mr. Ross. The summonses were left on her desk and had disappeared by the next day. Ms. Twaddle did receive a response from Ms. Watson on the afternoon of August 20 indicating she could have a leave of absence without pay or could make up the hours later in the year. The lock on Ms. Twaddle's office had been changed twice since she was reinstated. Ms. Twaddle also testified that she had two pieces of paper with respect to a reply to CUSA's response to the application on her desk that week which disappeared when she left the office for lunch.

35. On the afternoon of August 19 Ms. Watson attended at the Women's Centre. It was Ms. Twaddle's evidence that Ms. Watson had never previously utilized the Women's Centre. On this occasion, Ms. Watson asked Ms. Twaddle if she would mind if she sat in the Centre and read for a while. Ms. Watson sat on the couch reading material she brought with her. Ms. Twaddle testified that she found this uncomfortable and left. Ms. Twaddle also testified that CUSA had failed to pay her after her interim reinstatement.

36. Mr. Fouad Kanaan testified. He was the Volunteer Bureau co-ordinator and shared an office with another co-ordinator. He and the other co-ordinator had keys to the office as did CUSA executive members. His immediate supervisor was Theresa Cowan. He was a member of the "core group" and a union supporter. On July 12 Mr. Kanaan discovered that certain documents which he had placed in a "put-away" file on his desk were missing, and that documents had been erased from a diskette which was sitting on top of his computer. The whole disk was not erased, only certain documents, specifically letters relating to personnel matters between himself and CUSA, and in particular correspondence between himself and Theresa Cowan. The hard copy documents which were removed from the put-away file were also correspondence between Mr. Kanaan and Ms. Cowan. He had not looked at the documents for a number of days and therefore was not certain on which day the documents had been taken. Mr. Kanaan contacted Ms. Cowan when he realized the documents were missing and asked her to supply her copies of them to him, which she did. The campus security also became involved and Mr. Kanaan filed a report.

37. Mr. Kanaan had a difficult relationship with Ms. Cowan and the CUSA executive. He testified that he was frightened after Mr. Ross was terminated as he felt that he might also be fired. However, Mr. Kanaan resigned from his position on July 29, 1993 because of the working relations between himself and CUSA and the working environment. He testified that if none of the events involving CUSA's treatment of the union supporters had occurred he would not have resigned.

38. Stacy Fietz also testified under summons by the union. She is a publications officer and began working for CUSA on January 4. She provides graphic design and artwork production for printed matter for the service centres. Ms. Fietz was not involved in the union organizing campaign, but Mr. Ross had mentioned to her the possibility of a union being organized on July 6. Ms. Fietz testified that she was originally ambivalent in her response but that she believed she was giving positive feedback to Mr. Ross because she generally believes unions are "good things". The next time Ms. Fietz spoke to Mr. Ross about the union was the day he was fired. She testified that her reaction was dismay and shock and that she was somewhat fearful.

39. The following week Ms. Twaddle made an appointment to meet with Ms. Fietz after office hours. At that meeting Ms. Twaddle asked Ms. Fietz to sign a union card. Ms. Fietz would not sign it as she felt she needed time to consider. She testified that she thought at that point she would not sign the card because she was worried about the consequences. She did not know who

might find out. She was concerned that in light of what had happened to Mr. Ross, it would affect her relationship with the employer if it found out she had signed a card. She testified that after her conversation with Ms. Twaddle she would not sign a card because she felt that her position with CUSA would be jeopardized by demonstrating any support for these “troublemakers”. Ms. Fietz was also advised by Ms. Twaddle and Mr. Kanaan the day that Ms. Twaddle was terminated and Mr. Kanaan resigned. She testified that as of that day she would definitely not have signed a card because it was a symbol and a commitment and she was not prepared to take the consequences of that commitment.

40. Ms. Fietz was asked whether she tried to rally any colleagues to carry on with the organization campaign. Her answer was “No, because at that time we were talking about a few people against a large authority which seems to be able to do what it wants and I was sure the employer would want to subvert any efforts in this direction”.

41. Ms. Fietz testified that the atmosphere after Ms. Twaddle was terminated was that the employees were “high strung” and worried and that she began closing her door instead of leaving it open as she had in the past. It was her opinion that other CUSA employees would not sign union cards as a result of what had happened to Mr. Ross and Ms. Twaddle, and that their wishes would not be ascertainable by a vote. However, she testified that she herself would probably be able to vote her mind since she had now declared herself in the hearing anyway. She testified that other CUSA employees came into her office after the terminations and wanted to talk about them. In response to a question in cross-examination she replied that while she did not expect retribution from the employer, she did expect that “things would change” now that she had testified.

Argument

42. Although the responding party chose not to call any evidence through witnesses of its own, it did not concede any of the applicant’s allegations. It submitted that the Board should view the evidence and allegations in the context of this particular workplace. We should take into account the fact that both the executive and the members of the bargaining unit were only appointed for one-year terms and that in this situation students are supervising other students. It was pointed out that the executive members were unlikely to have any training or knowledge of the *Labour Relations Act*. Counsel conceded that this ignorance was not a defence but submitted that it was an explanation for some of the conduct which might have been inappropriate.

43. The responding party divided the various allegations of the applicant into two categories, one was described as trivial and the other as more serious. In the trivial category, CUSA included the allegation that its failure to respond in an expeditious manner to the leave of absence requests was a breach of the Act. It argued that this allegation was not supported in the evidence because the time in which it responded was reasonable. CUSA also submitted that Ms. Watson’s presence in the Women’s Centre after Ms. Twaddle’s reinstatement did not constitute continuing harassment and intimidation and was not a breach of the *Labour Relations Act*. CUSA argued further that the installation of a shredder was not harassment or anti-union activity and did not constitute an unfair labour practice. With respect to the theft of materials from Mr. Kanaan and Ms. Twaddle’s files. It was argued that there was no evidence which could link the thefts in any way to the organization campaign, nor was there any evidence upon which we could find that Ms. Cowan herself had removed the documentation. We were advised that even if we found that such thefts did occur, they were not harassment and did not constitute an unfair labour practice.

44. The allegations which CUSA considered to be more serious included the retrieval of the keys to the CUSA offices from the service co-ordinators, the meeting of June 9 and the terminations of Ms. Twaddle and Mr. Ross. Counsel submitted that at the time that the keys were

retrieved there was no evidence that anyone in management knew about the organizing campaign and that reducing the number of keys available made good sense. With respect to the June 9 meeting, CUSA noted that the core group was meeting amongst themselves during working time behind closed doors with the result that no one was staffing the offices of the service centres. It wanted to know what was going on because the core group were not sharing information with their supervisors or with the other co-ordinators and were not providing services to the students. Counsel submitted that viewed in that context, the meeting of June 9 and Ms. Cowan's questions with respect to these "secret" meetings made sense. CUSA argued that the union was discussed at this meeting because some people had been excluded and that this was not the "CUSA approach". Counsel noted that there is no reason to think that the responding party would be trying to discourage unionization as they already had a collective bargaining relationship with the permanent staff. CUSA submitted that the evidence suggested that the meeting had in fact strengthened the resolve of the core group, as they went immediately to the CUPE representatives and got union cards. He also noted the meeting was a closed meeting and only those persons involved knew about it.

45. With respect to the terminations, CUSA argued that there were ongoing complaints with respect to Mr. Ross and Ms. Twaddle, which led in both cases to a termination of employment. Counsel argued that on the totality of the evidence we could not find that the purpose of terminating them was to crush the unionization campaign.

46. CUSA submitted that the test under section 9.2 of the Act is whether the true wishes of the employees in the bargaining unit can be ascertained, and if they cannot, is it because of the employer's actions? Counsel pointed out that the remedial authority is discretionary as the section states, that the Board *may* certify the trade union. CUSA submitted that the union had the onus under section 9.2 and that this is an exceptional remedy to which we should only resort if we find that employees are unable to exercise free choice in this matter. Counsel referred us to the following decisions: *Charterways Transportation Limited*, [1982] OLRB Rep. Apr. 552; *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Ontario Bus Industries Inc.*, [1989] OLRB Rep. Nov. 1115; *Primo Foods Limited*, [1983] OLRB Rep. Apr. 593, and *Repla Limited*, [1990] OLRB Rep. Dec. 1319.

47. Counsel addressed the removal by the Legislature of what was a third criterion for remedial relief under what is now section 9.2 and what was formerly section 8 of the *Labour Relations Act*. Section 8 provided as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

CUSA submitted that although part three of the test, i.e., whether "a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit" has been removed from section 9.2, it still forms part of the analysis. Counsel argued that evidence of support for the union forms part of the determination of whether the true wishes of employees can be ascertained.

48. CUSA also argued that section 18 of the *Interpretation Act* suggests that the fact of a change in legislation does not necessarily mean that the substance of the section is any different. Section 18 of the *Interpretation Act* reads as follows:

18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law

under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

49. It was argued that there was evidence before us that the preference for unionization was not equally shared even at the beginning of the campaign by the service co-ordinators. It submitted that in this case there was no evidence that the true wishes of employees could not be ascertained, that there was evidence, rather, of a poorly-conducted organizing drive. CUSA also noted that the original application did not include approximately 20 members of the bargaining unit and the union could not therefore have been trying to organize a significant part of the bargaining unit. It was submitted that there was no evidence that the majority of the members of the potential bargaining unit even knew of the terminations of Mr. Ross and Ms. Twaddle, and that the only witness for the union who spoke specifically to whether or not she could vote her mind was Stacy Fietz, who indicated that she would be able to do so. CUSA argued therefore that the union had called insufficient evidence for the Board to be able to conclude that the true employee wishes are not ascertainable.

50. CUSA requested that we order a vote and noted that we could order it to post notices. It was argued that those measures would be sufficient to ensure that the employees' true wishes were ascertained and that it would not be appropriate to grant the union a certificate in these circumstances. CUSA argued finally that we should not grant a certificate in light of the slim support the union has shown in the evidence.

51. The union argued that the responding party committed repeated violations of the *Labour Relations Act*. It asserted that there is no decision in which the Board has found that a union organizer was terminated contrary to the Act in which a certificate did not issue. The union argued that the first criterion, that is whether or not CUSA committed unfair labour practices, had essentially been determined by the responding party's failure to call evidence and that the only issue remaining before us is whether or not the true wishes of the employees are likely to be ascertained.

52. The applicant referred us to jurisprudence under the former section 8 of the Act which it claimed firmly established that where the Board has found that unfair labour practices have occurred as a result of an employer making economic threats to employees or discharging union organizers during an organizing drive, a certificate will follow. The applicant referred to the following cases: *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250; *Winson Construction Limited*, [1976] OLRB Rep. Nov. 314; *Ex-Cell-O Wildex*, [1977] OLRB Rep. July 466; *Radio Shack*, [1979] OLRB Rep. March 248; *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *DI-AL Construction Limited*, [1983] OLRB Rep. March 356; *Toronto Fabricating Company*, [1985] OLRB Rep. Oct. 1528; *Maplehurst Hospital Limited*, [1986] OLRB Rep. July 996; *Nepean Bus Lines Inc.*, [1990] OLRB Rep. Mar. 295; *Royce Dupont Poultry Packers*, [1989] OLRB Rep. May 492; *David Chapman's Ice-cream Limited*, [1990] OLRB Rep. July 778; *Repla Limited*, [1990] OLRB Rep. Dec. 1319; *Mikes Painting & Decorating Ltd.*, [1991] OLRB Rep. Jan. 67; *Wm. J. Davidson Electric Inc.*, [1992] OLRB Rep. Jan. 101; *Royal Homes Limited*, [1992] OLRB Rep. Feb. 199; *Beaver Lumber*, [1992] OLRB Rep. May 553; *Grant Development Corporation*, [1993] OLRB Rep. Jan. 21; *Loeb Highland*, [1993] OLRB Rep. March 197; *Loeb IGA Highland*, [1993] OLRB Rep. March 208.

53. Counsel argued that in this case there was evidence of surveillance, of interrogation and monitoring of union organizers, of intimidation and harassment through theft of materials, captive audience meetings, threats to economic security, discharges of two union organizers and pressuring a union supporter to quit. The union argued that these incidents established a pattern of harassment and intimidation over a period of two months. It was submitted that in light of these breaches

of the *Labour Relations Act*, the true wishes of employees are not ascertainable. The union argued that we will never know if the campaign would have run out of steam or would have been successful, and once the employer has "poisoned the well", the Board cannot clean it through the measures suggested by the responding party. Counsel submitted that there was extensive publicity with respect to the discharges, and putting Ms. Twaddle and Mr. Ross back to work would not be sufficient to remove the chilling affect. It was argued that a secret ballot would not ensure that employees' true wishes would be ascertained.

54. The union noted that the test under section 9.2 is that the true wishes were not likely to be ascertained and that the Board does not have to be certain that they are not ascertainable. We were also referred to the approach in British Columbia which province, it was submitted, has materially different language from section 9.2. Subsequently, counsel forwarded further decisions from British Columbia to the Board. The responding party forwarded written submissions with respect to those decisions. As the legislation in British Columbia is significantly different from that in Ontario, we do not find the decisions provided to be of assistance.

55. The union also addressed the third criterion which was found in the former section 8 of the Act and has been deleted. It noted that the removal of that section reflected a concern that that criterion allowed an employer to come down hard on the union at the beginning of an organizing campaign with no consequences because the union would never be able to get the kind of support required to meet it. It was argued that it would be inappropriate now for the Board to consider any evidence of adequacy of union support under section 9.2. It was asserted that it was irrelevant that members of the union had not approached all of the employees in the potential bargaining unit, or that it had not identified the full extent of the bargaining unit as of the time of the application. It was pointed out that if the union had the ability to organize without interference, it may well have determined the full extent of the bargaining unit prior to application. It was argued that in any case, the test is not how well the campaign would have succeeded had it been allowed to proceed, but whether or not the true wishes of the employees may be ascertainable following the employer's commission of unfair labour practices.

56. Counsel requested that we issue a certificate for the bargaining unit agreed to by the parties, that we confirm the reinstatement of Ms. Twaddle and Mr. Ross, and that we order the employer to offer Mr. Kanaan a chance to return to his position. Counsel also requested the usual postings, an order that it be permitted to hold a meeting with all employees in the bargaining unit during working hours on the responding party's premises, an order that Ms. Twaddle and Mr. Ross and all the other union supporters who attended the hearing on behalf of the union be compensated for any financial loss as a result of attending the hearing, and that they should be compensated for their costs in travelling and staying in Toronto for the hearing. In the alternative, the union requested the fullest relief that the Board could order, shy of a certificate, including postings, publicity of the employer's unfair labour practices and a secret ballot vote.

57. In reply, the responding party argued that the Board's extensive case law in this area did not stand for the proposition that a certificate would automatically follow the termination of union organizers, and that each case had to be viewed on its facts to determine the ascertainability of employee wishes on the basis of subjective evidence submitted by the union. It argued that the subjective evidence submitted in this case was insufficient to meet the union's onus. Counsel also denied that we had the remedial authority to order the employer to offer Mr. Kanaan the opportunity to return to his position, and that it was contrary to Board policy for us to order the responding party to pay costs of anyone in this matter.

Decision

58. We have carefully considered the evidence submitted in this matter and find that the responding party has violated sections 65, 67 and 71 of the *Labour Relations Act*. However, we do not find that a number of the union's allegations about which evidence was introduced constituted violations of the Act. Specifically, we do not find that the failure to grant Mr. Ross and Ms. Twaddle leaves of absence to attend the hearing until August 20 nor the purchase and installation of a shredding machine to be violations of the Act. We are also unable to conclude on the evidence that anyone acting on behalf of CUSA was responsible for the disappearance of the documents from Mr. Kanaan's or Ms. Twaddle's files or from Ms. Twaddle's desk since so many people had access to their offices.

59. We do find, however, that other evidence supports the allegations that the responding party embarked on a scheme of harassment and intimidation of union organizers and supporters. Specifically, we find that Ms. Watson's attendance at the Women's Centre after Ms. Twaddle was reinstated, the requirement to close and lock the door between Mr. Ross and Ms. Kennedy's offices and the requirement that employees return keys to the CUSA office, were part of this scheme. We do not accept that these incidents were merely coincidental with the organizing drive, and our perception of them is coloured by the June 1 meeting with Ms. Twaddle at which she was called a "ringleader", as well as by the termination of Mr. Ross and Ms. Twaddle. As CUSA has also chosen not to call any witnesses to provide any other explanation for these actions, we are satisfied that they were motivated by anti-union considerations.

60. We find that the responding party intimidated and harassed employees who wished to form a union by requiring them to attend the June 9 meeting at which it raised the issue of unionization and identified or attempted to identify union supporters. We also find that CUSA intimidated and threatened employees by suggesting that some of the student services would not be supported in the event that a union organization drive was successful.

61. We also find that the responding party's treatment of Ms. Twaddle, including the numerous meetings she was required to attend and the letters of reprimand she received were part of the scheme of intimidation and harassment which was motivated, at least in part, by her involvement in the union organizing campaign. We accept that the termination of both Mr. Ross and Ms. Twaddle was motivated by their involvement in the organizing campaign, and was an attempt to punish them for that involvement as well as an attempt to prevent the union from successfully organizing the workplace. We note that there was no evidence that Mr. Ross had any previous disciplinary record, and that both he and Ms. Twaddle had only been employees for a few months. We also note that although a number of complaints were made to Ms. Twaddle about her "attitude", these complaints were not substantiated and that she had been identified as a "ringleader" by Ms. Cowan. We find that CUSA's problems with Ms. Twaddle's "attitude" were related at least partially to her being a "ringleader" in the union organizing campaign. The one specific complaint levelled against Ms. Twaddle was that she had criticized a member of the University administration for the way he had handled a very serious threat to women members of the student body the previous year. We note that Ms. Twaddle was not terminated for that interaction at the time at which it occurred. Furthermore, given Ms. Twaddle's position as co-ordinator of the Women's Centre and, in that role an advocate for women on campus, it was unlikely that she would have been terminated for that reason. It was for these reasons that we ordered that Mr. Ross and Ms. Twaddle be reinstated to their positions in our decision of September 2, 1993.

62. The union also requested that we order the responding party to offer Mr. Kanaan the opportunity to return to his former position. The evidence disclosed that Mr. Kanaan had a diffi-

cult relationship with the CUSA executive. We accept that that situation was exacerbated by Mr. Kanaan's involvement as a union supporter and we also accept that it is possible that Mr. Kanaan may also have had his employment terminated had he not quit. However, Mr. Kanaan did choose to quit his employment. His resignation was not in circumstances in which the employer had indicated to him that if he did not quit, he would be terminated. Under the circumstances, we find that it would not be appropriate to order the responding party to offer him reinstatement.

63. The union also requested that we order the responding party to pay the costs of Ms. Twaddle, Mr. Ross and other union supporters who attended the hearing. We do not believe these are appropriate circumstances in which to reconsider the Board's general policy of not ordering costs.

64. In our decision of September 2 we made the following orders:

Accordingly, the Board:

- (1) declares that the responding party Carleton University Students Association Inc. has contravened sections 65, 67 and 71 of the *Labour Relations Act*;
- (2) orders that Renée Twaddle and John Wayne Ross be reinstated to employment in their former positions on a permanent basis, with full compensation for losses of income and benefits, including interest as calculated in the usual manner;
- (3) directs that the responding party post for 60 consecutive days in conspicuous places in the workplace the Notice to Employees attached as Appendix "A" hereto.

APPENDIX "A"

THE LABOUR RELATIONS ACT

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE ONTARIO LABOUR RELATIONS BOARD

We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both Carleton University Students' Association Inc. and Canadian Union of Public Employees had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the *Ontario Labour Relations Act* in terminating the employment of Renée Twaddle and John Wayne Ross and has ordered us to inform our employees of their rights.

The Act gives all employees these rights:

- To organize themselves;
- To form, join and participate in the lawful activities of a trade union;
- To act together for collective bargaining;
- To refuse to do any and all of these things.

We assure all of you that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT intimidate or exert undue influence upon you, whether through meetings, individual conversations or otherwise, to prevent you from exercising your right to associate and participate in the lawful activities of a union.

WE WILL NOT layoff, discharge or threaten to lay off or discharge any employee because of that employee's union activity or sympathies.

WE WILL NOT in any other manner interfere with or restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL comply with all directions of the Ontario Labour Relations Board.

Carleton University
Students Association Inc.

Per: _____
(Authorized Representative)

DATED THIS 2ND DAY OF SEPTEMBER, 1993

65. We find that the responding party violated sections 65, 67 and 71 of the *Labour Relations Act* in the manner described in the paragraphs above and that, as a result, the true wishes of the employees are not likely to be ascertained.

66. We find that CUSA's suggestion at the June 9 meeting that a successful unionization campaign would affect the provision of student services and by implication, the co-ordinators' positions, was an economic threat made to employees in the process of an organizing drive. The effect of such a threat on employees would be to instill fear, with the result that their true wishes are not likely to be ascertained. (See *Radio Shack, supra*; *Brinks Canada Limited, supra*; *Manor Cleaners Limited, supra*, *Wm. J. Davidson Electric Inc., supra*; *J. Sousa Contractor Limited, supra*.)

67. We also find that the termination of the two union organizers in these circumstances would have a chilling effect on the members of the bargaining unit by demonstrating to them that CUSA is prepared to use its economic power to penalize employees who seek to exercise their rights under the Act, and makes it unlikely that their true wishes may be ascertained. (See *Radio Shack, supra*; *DI-AL Construction Limited, supra*; *Toronto Fabricating Company, supra*; *Maplehurst Hospital Limited, supra*; *Nepean Bus Lines Inc., supra*; *Royce Dupont Poultry Packers, supra*; *David Chapman's Ice-cream Limited, supra*; *Repla Limited, supra*; *Wm. J. Davidson Electric Inc., supra*; *Royal Homes Limited, supra*; *Grant Development Corporation, supra*; *J. Sousa Contractor Limited, supra*.)

68. It is unnecessary for us to consider whether or not the union has adequate support for collective bargaining. The removal of the third criterion from section 9.2 is, in our view, a clear direction to the Board that the question of whether a trade union has membership support adequate for purposes of collective bargaining is not one which we should any longer consider. This view is consistent with the ordinary rules of statutory interpretation which suggest that the specific deletion of a substantive requirement from legislation be understood to mean that that requirement is no longer necessary. We do not accept CUSA's argument that section 18 of the *Interpretation Act* should lead us to conclude otherwise. We interpret section 18 of that Act to mean that a change in the law should not lead to the conclusion that the former law was different from the amended Act, not vice versa, as argued by CUSA. We also do not accept the responding party's argument that membership support is a factor which should be considered under the criterion of ascertainability. To accept such an argument would be to reintroduce a requirement for section 9.2 relief that the Legislature has clearly decided to dispense with.

69. Finally, even assuming that the potential success of the union's organizing campaign is a relevant consideration in these circumstances (a proposition about which we are not absolutely

convinced), we are not satisfied that the campaign would necessarily have been doomed regardless of CUSA's unfair labour practices.

70. The only issues for the Board to decide are whether the true wishes of employees are likely to be ascertained, and if not, is it because of the employer's contraventions of the Act. We have found that employee wishes are not likely to be ascertained as a result of CUSA's violations of the Act. We order that the union be certified for the following bargaining unit to which the parties have agreed, on an interim basis, until the outstanding bargaining unit dispute is resolved:

all employees of Carleton University Students' Association Inc. in the City of Ottawa, save and except Department Heads, persons above the rank of Department Head and employees in bargaining units for which any trade union held bargaining rights as of August 5, 1993, and, pending resolution by the Board, excluding as well Brenda Kennedy, classified as the Foot Patrol Coordinator.

A Labour Relations Officer is hereby appointed to inquire into and report to the Board with respect to the duties and responsibilities of the disputed individual.

71. We also order the responding party to post copies of this decision and the Notice to Employees attached as Appendix "A" hereto for 60 consecutive days in conspicuous places in the workplace. We further order that the applicant be permitted to hold a meeting with all employees in the bargaining unit during working hours on the responding party's premises.

72. A final certificate must await the determination of the bargaining unit issue in dispute.

73. We remain seized with respect to any matters arising with respect to the implementation of this decision.

DECISION OF BOARD MEMBER W. A. CORRELL; October 29, 1993

1. I do not agree with that part of this award which grants an automatic certification of the union.

2. One of the unusual factors of this case has been the nature of the organization which is involved. It is a student executive council and a group of employees (CUSA), many of them students supplying certain services to the student body. Some of these services are supplied through the offices of co-ordinators. The student executive is in office for a one year term which terminates in May 1994. The student co-ordinators are hired by the executive and paid an honorarium for their term which is also one year and terminates May 1994. This is not a normal management-employee relationship and it is unlikely that many applications for certification have been made in circumstances where the tenure of both employees and employer are temporary in nature.

3. The importance of this factor in this case is evident in the quality of the management process and the lack of management experience among the members of the executive. This led in great part to the discharge of the two people. It also led to my support of that part of this decision to reinstate those two people. I do not agree that there is sufficient evidence to establish an anti-union animus and given that there is already another full-time union of employees of CUSA. In my view there was certainly bad feelings between individuals and there were incidents of inappropriate behaviour and misunderstanding but not sufficient to warrant discharge.

4. A further part of this factor of inexperience is the ineptness of the organizing campaign by the employees. Evidence of this includes the length of time taken by the organizers to expand their initiatives from the "core group", the hesitant approach to a few people outside of that

group, the fact that only four cards were signed out of an estimated 50 potential bargaining unit members that no one outside of the core signed cards and the late approach by the "core group" to the Union and that party's failure to supply cards promptly. In addition the "secret meetings" which were held "by the core group" on the employer's premises and during working hours added to uncertainty, mystery and bad feeling in the work place over a period of some three months. Against this background other aspects of this case must be weighed.

5. The Act provides the Board with a discretion to certify the union under section 9.2 without a vote. The Board "may" do so if it is satisfied "that the true wishes... are not likely to be ascertained".

6. It must follow therefore that the Board having such a discretion must carefully analyse each situation to discover why it is granting or not granting automatic certification. It is not a case of certification under any circumstances and each case has to be considered on its own merits.

7. The majority have decided that the *Legislature*, in deleting certain words from the former section 8 of the Act, have sent the message that the Board should not consider as a factor the level of adequate union support in exercising its discretion. Counsel for CUSA, the student executive, disagrees with this on the basis of the *Interpretation Act*.

8. For my part, I support the views of counsel for CUSA. In addition to his argument, it is my opinion that given the Board's discretion it is natural among other things to assume, in its analysis that a union must have a distinct measure of adequate support of the membership it seeks to represent. Not to do so would be a denial of fairness to those who have other views particularly if those views were held by a substantial majority. It would also be a burden upon both parties to any subsequent agreement. For instance management might well be sceptical if the union in presenting its proposals at negotiations or challenging an action of management under the collective agreement could not demonstrate to management that it spoke from a position of strength. Similarly it places management in a dilemma in formulating any policy decision if there is doubt in their minds about the adequacy of the support of the union by its members. This produces a situation that is not conducive to sound Labour Relations. This Board in its analysis of any situation under section 9.2 should continue to investigate the level of union support in exercising its discretion.

9. At no time during the hearings of this case was there evidence of substantial support of the union organization drive. First, it is a broad and varied bargaining unit encompassing employees in counselling activities, educational support, tavern and recreation activities, restaurant service, cleaning and security. Most of these people are part-time and students, with some as full-time workers. We heard only from the "core group" who are co-ordinators plus one witness from the graphics communications centre. Vague references were made to contact with bar employees and security people, but no witnesses came forward. In total it appears that no more than four people from these other groups were contacted and they were only engaged in general conversation. The bargaining unit it is estimated will include about 50 people, but no cards were signed outside of four of the "core members". No commitment of support came from others. The campaign appeared by this evidence to be slow, disjointed and without focus or continuity. There was certainly no groundswell of support or dedication to unionization by others.

10. I would, aside from the above, question the appropriateness of posting any notice about employee rights which is designed to educate or punish a management group that will not exist after May 1994. It would be likened by most including any student of law or labour relations to shooting a dead horse.

11. A more suitable and progressive solution should be considered. It was clear in the evi-

dence that those employees involved in this case did not understand the nature and process of the vote as a remedy. They did not understand the degree of secrecy of the ballot provided by the Act, the degree of supervision provided by the Board's officers in conducting the secret ballot and the overall protection provided by the process for the confidentiality of the voters. This structure for secret ballot voting has been carefully constructed and managed by the Board over the years so that the privacy of the individual is respected and so that the voters true wishes can be ascertained. That has been the goal and it has been successful. I know of no failures in this regard.

12. There is another factor in this case that encourages voters to express their true wishes and it is a powerful one. The Board has reinstated the discharged employees with full compensation. That in itself carries a clear message to those in the bargaining unit. Management cannot act arbitrarily with impunity.

13. In addition and for this unusual situation a different notice could be posted to replace the Board's standard form. It would be more appropriate for those, who might be apprehensive to inform them about their rights and the nature of the standard voting process.

14. The notice could explain the employee rights and announce a meeting to be held on the employer's premises with those attending paid their appropriate wage for the time. The meeting would not be for the sole benefit of the union but supervised by a Board officer with representation of the union and the student executive also present. The purpose would be to instruct all concerned about their rights, to describe the Act's function in this respect, to inform all present about the voting procedure, its nature and its protection of privacy as well as the time and date of the vote.

15. For the above reasons I do not agree with the majority award and urge that the above proposal for a different scenario be considered and implemented as a more practicable way of introducing the Board's approach to its responsibilities under the revised Act. The majority may prevail in this case but this alternative may be applicable in other situations.

16. I would order that for the above reasons a vote be held in accordance with the above process.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING ARISING OUT OF THE EFFORTS OF THE CANADIAN UNION OF PUBLIC EMPLOYEES TO BECOME THE COLLECTIVE BARGAINING AGENT FOR THE EMPLOYEES OF THE CARLETON UNIVERSITY STUDENTS' ASSOCIATION INC. THE ONTARIO LABOUR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE LABOUR RELATIONS ACT FOR REASONS DESCRIBED IN ITS DECISION OF OCTOBER 29, 1993 WHICH WE ARE ALSO ORDERED TO POST. THE BOARD HAS ISSUED A CERTIFICATE TO THE CANADIAN UNION OF PUBLIC EMPLOYEES BECAUSE OF THE CARLETON UNIVERSITY STUDENTS' ASSOCIATION INC.'S BREACH OF THE LABOUR RELATIONS ACT. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

CARLETON UNIVERSITY STUDENTS'
ASSOCIATION INC.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 29TH day of OCTOBER, 19 93 .

1592-93-R Labourers' International Union of North America, Local 247, Applicant v. **Crane Canada Inc.**, Responding Party

Bargaining Rights - Certification - Practice and Procedure - Termination - Timeliness - Union responding to employer application to terminate bargaining rights under section 60 of the Act by consenting to Board order terminating bargaining rights - Union applying for certification in respect of same bargaining unit two weeks later - Board rejecting employer's argument that it ought to refuse to entertain union's certification application and that any new certification application should be barred for six months - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Carolyn Hart* and *Victor Claro* for the applicant; *Alan Whyte* for the responding party.

DECISION OF THE BOARD; October 15, 1993

I

1. This is an application for certification.
2. There is no dispute and the Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. The parties have agreed and the Board finds that the unit of employees appropriate for collective bargaining should be framed as follows:

all employees of Crane Canada Inc. at its Crane Supply Division in the City of Kingston, save and except Branch Manager, persons above the rank of Branch Manager, office, clerical, sales and technical staff.
4. In accordance with the Board's Rules and section 8 of the Act, some seventy-five per cent of the employees in the above-described bargaining unit have indicated their wish to be represented by the applicant trade union.
5. There is no dispute about the "voluntariness" or validity of this union membership evidence, nor its practical and legal import: a substantial majority of the employees have signified their desire for trade union representation.
6. The issue raised by the employer is whether the Board should refuse to entertain the union's certification at this time, or, in the alternative, refuse to certify the applicant without the confirmatory evidence of a representation vote.
7. Some of the provisions of the Act to which reference will be made, are as follows:

5.-(1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 62, apply at any time to the Board for certification as bargaining agent of the employees in the unit.

60.-(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 54 and no such notice is given by the employer, the Board may, upon the application of the employer or of any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 54 or that has received notice under section 54 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

* * *

104.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

* * *

105.-(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

• • •

II

8. The facts are not in dispute.

9. In 1992 the union was certified as the bargaining agent for the employees in the above-described bargaining unit. Thereafter, the union either failed to give timely notice to bargain or failed to diligently pursue bargaining within the time frame contemplated by section 60. That lapse prompted the employer on July 22, 1993 to apply to the Board for termination of the union's bargaining rights.

10. When the Board receives an application for termination of bargaining rights like the one mentioned above, it normally schedules a hearing to ascertain the facts, and receive representations on whether or not the union's bargaining rights should be terminated, with or without a Board-supervised representation vote. However, that is not what happened here.

11. Upon receiving notice of the termination application, the union ascertained from the employees that they still wished to be represented by the union; but instead of contesting the employer's termination application, the union advised the Board that it consented to the issuance of a Board Order declaring that it no longer represented the employees in the bargaining unit. The union calculated that the employees' interests would be better served by avoiding the expense, delay, and potential complications of a hearing before the Board, in Toronto - a hearing which might or might not have resulted in a termination of bargaining rights, either following or perhaps without a representation vote. To avoid this process and possible result, the union made a "tactical" decision. The union consented to the termination of bargaining rights with the belief and

expectation that, since it continued to enjoy substantial employee support, it could promptly reapply for certification.

12. And that is what the union did.

13. By decision dated July 30, 1993 the Board declared that the union no longer represented the employees in the bargaining unit. Since the union was not resisting the termination application, this result flowed relatively quickly. There was no need for a hearing. However, two weeks later on August 13, 1993 the union re-applied for certification based upon fresh documentary evidence from the employees indicating that they wished to be represented by the union. It is that certification application which is currently before the Board.

14. The employer argues that the Board should not entertain this new certification application and should bar any new application for a period of six months. The employer concedes that the circumstances here do not fall within the ambit of section 105(2)(i), because the union is not an "unsuccessful" applicant within the meaning of that section. However, the employer contends that the new application is "vexatious" or an "abuse of process" and thus should not be entertained. In the employer's submission, the authority to refuse the union's application can be found either in section 104(13) of the Act, or in the Board's general power to control its own processes confirmed by the *Statutory Powers Procedure Act*.

III

15. When the certification application was filed on August 13, 1993, the employees were unrepresented. There was no outstanding Board certificate relating to them, nor were they bound by a collective agreement. On the surface, therefore, this application is timely, because section 5 specifies that a certification application can be made "at any time".

16. Does section 104(13) provide a basis for refusing the certification application, or imposing some kind of six-month bar? We do not think so.

17. First, it is difficult to characterize the refusal of an otherwise timely certification application as a matter of "practice and procedure". What is involved are substantive rights - rights, moreover, which are affirmed in sections 2.1, 3, and 5 of the Act. Second, where the Legislature has limited the right to bring a representation application, it has done so expressly: in the timeliness requirements of section 62 of the Act, and the limited discretion granted to the Board under section 105(2)(i) - which, we repeat, has no application here. Against that background, we do not think we can lightly infer some other discretionary power to impose a "bar" or refuse to entertain an otherwise timely certification application.

18. And even if the Board had such discretion, we are not persuaded that we would exercise it here.

19. The employer's termination application was not based upon a lack of employee support. The employer's complaint was that the union was not diligently pursuing collective bargaining and that the employer was therefore prejudicial. There were no employees intervening to support the application or otherwise indicate their views in the manner contemplated by the Rules. In those circumstances, it is highly unlikely that the Board would have terminated bargaining rights unless there was no valid excuse *and* the union had "lost" a representation vote.

20. And even in that scenario, if the matter had been fully litigated, would there have been a "bar" under section 105? In our view, the answer is "no" because there would be no

“unsuccessful” application within the meaning of section 105(2)(i). It would be curious if the employer were in a better position where there is no negative vote from employees, and, on the contrary, every indication that the majority want the union.

21. More fundamentally, though, the purpose of the Act is to facilitate collective bargaining; and even section 105(2)(i) has never been regarded as a “penalty” provision. That section has not been invoked unless there have been repetitive applications for certification, or the employee wishes have been tested in a representation vote so a period of stability is called for. None of those circumstances are present here, nor does the employer identify any real prejudice, other than having to return to the bargaining table - where, paradoxically, it might have been anyway, if it had pressed the union to bargain, rather than petitioning the Board to terminate bargaining rights on the basis of the union’s inactivity.

22. No doubt the employer is surprised (and perhaps annoyed) by the sequence of events it set in train. However, despite the unusual circumstances of this case, we think predominant weight should be given to the employees’ desire to participate in collective bargaining through a trade union of their choice. They should not be deprived of that opportunity because of the union’s earlier failings.

23. For the foregoing reasons, the Board is prepared to entertain this certification application, and sees no reason, if the union is otherwise “certifiable”, why the Board should exercise its discretion to order a representation vote.

24. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on August 13, 1993, the certification application date, had applied to become members of the applicant on or before that date.

25. A certificate will issue to the applicant.

2117-93-M National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1256, Applicant v. Crown Fab Division, The Allen Group Canada, Limited, Responding Party

Adjustment Plan - Discharge - Interference in Trade Unions - Interim Relief - Remedies - Unfair Labour Practice - Bargaining unit chairperson discharged some months before scheduled closure of part of employer’s plant - Chairperson’s discharge grievance being arbitrated, but arbitration proceeding likely to continue beyond closure date - Employer refusing to discuss adjustment plan with union so long as chairperson included on union’s bargaining committee - Union seeking order preventing employer from refusing to allow chairperson to participate as member of union committee negotiating adjustment plan - Employer identifying no significant harm resulting from granting order sought - Board directing employer to cease and desist from refusing to recognize and deal with chairperson as member of union committee, and also to meet with union committee in order that parties may bargain in good faith to make adjustment plan

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

APPEARANCES: *Lisa Kelly, John Amato and Steve Walden for the applicant; Bernard Gmeterick for the responding party.*

DECISION OF THE BOARD; October 15, 1993

1. This is an application for an interim order filed pursuant to section 92.1 of the *Labour Relations Act*. This application is brought in relation to an application (the “main application”) brought under section 91 of the Act in which the applicant (also referred to as the “union”) alleges that the responding party (also referred to as the “employer” or the “company”) has violated sections 3, 41.1, 65, 67, and 71 of the Act.
2. The applicant, as required by the Rules, filed an application including supporting declarations. The company, although it was represented by Mr. Gmeterick at the hearing in this matter, had filed no reply or supporting declarations as required under the Rules.
3. It became readily apparent, however, that there was no significant dispute between the parties regarding the salient facts giving rise to this application. As a result it was not necessary for the Board to deal with the consequences of the employer’s failure to comply with the Rules.
4. The parties have had a collective bargaining relationship for some time. On September 20, 1992, the company posted a notice that it would be closing part of its Mississauga plant and acknowledging that the terms of the closure would be discussed with the union.
5. Steven Walden (the “grievor”) has been the union’s bargaining unit chairperson since 1986. On March 24, 1993 he was terminated. His discharge is the subject of a grievance which has proceeded to arbitration pursuant to the expedited arbitration provisions in the Act. Four days of hearing took place in May and June, 1993. Further hearing days in that matter are scheduled for October and November and, possibly, December of this year.
6. Preliminary discussions between the parties regarding the upcoming closure began in May of 1993. At that time the precise closure date was not entirely certain. From that time until the filing of the instant application the company has refused to discuss any readjustment plan with the union so long as the grievor was included on the union’s bargaining committee.
7. On August 30, 1993 the employer sent registered letters to most of its employees advising them of an October 22, 1993 closure date. The employer continued to refuse to meet with any bargaining committee which included the grievor.
8. The present application as well as the main application were both filed on September 29, 1993.
9. The union, in support of its request for an interim order, relied upon the Board’s decision in *Loeb Highland*, [1993] OLRB Rep. March 197. That case makes clear that the Board will consider whether the applicant has an arguable case in the main application and will weigh the relative harm of granting or not granting the interim relief sought in determining whether or not such relief is appropriate in a given case.
10. Having considered the largely undisputed facts of this case and the authorities relied upon by the applicant (*House of Braemore Upholstered Furniture*, [1967] OLRB Rep. Jan. 815; *No-Sag Spring Company Limited*, [1967] OLRB Rep. Mar. 992; *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309; *Arnold-Nasco Limited*, [1978] OLRB Rep. July 587; *High Times Publication Ltd.*, [1984] OLRB Rep. Oct. 1448; *Plastics CMP Limited*, [1982]

OLRB Rep. May 726; and *McDonnell Douglas Canada Limited*, [1988] OLRB Rep. May 498) we are satisfied that the applicant has made out an arguable case for the relief sought in the main application. We make no further comment regarding the merits of that application which will be dealt with, if necessary, by the panel hearing that case.

11. In terms of the relative harm resulting from the order sought being or not being granted, the applicant asserted that with a scheduled October 22, 1993 closure date there are many issues to be dealt with by the parties regarding an adjustment plan (hopefully prior to the scheduled closure). Although the applicant has made efforts to resolve the arbitration hearing expeditiously, it now appears that proceeding will continue well beyond the closure date. If the union is prevented from selecting all its representatives to the bargaining committee it will be difficult to remedy that shortcoming retroactively. The union emphasized that it was not seeking the grievor's interim reinstatement nor even a broad direction that the employer continue to recognize him as the bargaining unit chairperson. All the union is seeking is an order which would prevent the employer from refusing to allow the grievor to participate as a member of the union committee negotiating the adjustment plan.

12. Apart from questioning the wisdom of the grievor's continuing participation on that committee, the company identified no significant harm which would result from the Board granting the order sought. In this context we note that we have not felt it appropriate to consider the employer's expressed reservations to the extent that they relate to its view of relations between union officials and bargaining unit employees. The fact remains that the employer has not identified any harm it will suffer if the order sought is granted. We do note, however, that the employer has acknowledged in these proceedings that it is obliged to deal with the union. It was for these reasons that the Board, after recessing to consider the parties' submissions delivered the following oral ruling at the hearing in this matter:

Having considered the materials filed and the submissions of the parties and for reasons which will issue in writing the Board is satisfied that it is appropriate to issue the following orders pending the disposition of the section 91 complaint (the "main application"):

The responding party employer is hereby directed to:

- (i) cease and desist from refusing to recognize and deal with Steven Walden as a member of the applicant's bargaining committee; and
- (ii) meet with the applicant's bargaining committee, including Steve Walden, in order that the parties may bargain in good faith and make every reasonable effort to make an adjustment plan

CONCURRING OPINION OF BOARD MEMBER G. O. SHAMANSKI; October 15, 1993

1. Albeit I concur with this decision. I respectfully offer my viewpoint with respect to the overall labour relations implication that may flow from our directive.

2. I seriously question the union's wisdom of seeking the grievor's continuing participation on the negotiation committee. It seems to me that this may have more of a adverse effect than beneficial effect on the objective of negotiating an adjustment plan to deal with the contemplated closure.

0952-93-JD The Labourers' International Union of North America, Ontario Provincial District Council, and the Labourers' International Union of North America, Local 625, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 494 and **Delsan Demolition Limited**, Responding Parties

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Labourers' union and Carpenters' union disputing assignment of certain work in context of demolition project - Work in dispute involving erection of wooden hoarding with canopy around site of building to be demolished, with hoarding to remain throughout construction of new building on same site - Board considering how 1986 Labourers' designation to represent "construction labourers" engaged in demolition in ICI sector impacting on work assignment disputes - Board determining that it ought to look initially to demolition project evidence (as opposed to evidence of all types of ICI work) within Board Area in question - Only where this practice evidence is insufficient to enable Board to dispose of matter will Board look to other ICI practice with the Board Area - Board directing that disputed work be assigned to Carpenters' union

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *John Moszynski*, *Tony Morga* and *Caroline Hart* for the applicants; *David McKee* and *Jim Caron* for Carpenters Local 494; *C. Osborne* and *Pina Farraro* for Delsan Demolition.

DECISION OF THE BOARD; October 27, 1993

1. This is a jurisdictional complaint, filed in June, 1993, pursuant to the recently amended section 93 of the *Labour Relations Act* ("the Act"). The Board held a consultation with the parties.
2. This case appears to be the first occasion in which the Board is called upon to make a decision in a jurisdictional dispute that arises in the context of a demolition project or demolition site, where the contest is between the Labourers' and another construction union. It also appears to be the first matter in which the Board is called upon to comment upon the Labourers' demolition designation.
3. The work in dispute involves the erection of wooden hoarding with canopy around the site of the Steinberg building at the corner of Goyeau Street and Chatham Street in Windsor, Ontario. The hoarding was to remain throughout both the demolition of the existing Steinberg building and the construction of a new building on the same site.
4. The employer, Delsan Demolition Limited, is a specialty demolition contractor, whose primary work has always been the tearing down or demolishing of various buildings or structures. In June, 1992, the Ministry of Government Services called for bids for the demolition of the Steinberg building. The job specifications for the demolition work included the erection of the hoarding and walkway surrounding the site. All of the bidders were speciality demolition contractors, and Delsan was awarded the contract in August, 1992.
5. Both unions have a bargaining relationship with Delsan. For many years, the group of specialty demolition contractors in the province, the Metropolitan Toronto Demolition Contractors Inc. (or Association), of which Delsan is a member, and the Labourers' International Union of North America, Ontario Provincial District Council have been bound to a Provincial Agreement

(the “Demolition Agreement”), covering demolition work in the province. At all material times, Delsan has been bound by the applicable Demolition Agreement. The terms of that agreement specifically cover “the erection and removal of hoarding”.

6. The Carpenters have only recently acquired bargaining rights for Delsan. They filed an application for certification relating to a new construction (as opposed to demolition) project of Delsan’s. In a decision dated April 15, 1991, the Board certified the Carpenters for “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry, and all other sectors” in Board Area No. 8. By operation of law (see, for example, sections 146(1), and 147(4) of the Act), Delsan became immediately bound to the Carpenters Provincial Agreement. The terms of that agreement also cover work of the nature of the work in dispute here.

7. After Delsan assigned the work in dispute to the Labourers’, the Carpenters filed a grievance and in turn an application before the Board pursuant to section 126 of the Act, relying upon their rights set out in their Provincial Agreement. Subsequently, the parties agreed to defer consideration of the section 126 application, pending the filing and resolution of the instant jurisdictional dispute.

8. Some background history is helpful. As noted, the demolition contractors and the Labourers’ have been parties to an agreement governing work on demolition projects throughout the province. This arrangement dates from the 1960’s, and generally speaking, the Labourers’ have represented “all employee” bargaining units of workers employed by demolition contractors to perform demolition work. Under these agreements, members of the Labourers’ have acted as a general workforce for the demolition contractors, in many cases performing the work that other trades customarily would perform in other (non-demolition) types of construction. “Demolition” has historically represented a different type of work and workforce, and the arrangements between the players have been different than in other parts of the construction industry, including arrangements about work assignments. It cannot be said, however, that the other trades have knowingly or willingly acquiesced in these special arrangements.

9. It is also necessary to briefly touch upon the relevant legislation. In section 1(1) of the Act, “construction industry” is defined as meaning “the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures etc.”. “Demolition” is therefore construction industry work.

10. The construction industry is divided into sectors, but the definition of “sector” in section 119 of the Act does not include reference to the “demolition” sector. It is not a distinct “sector”. Rather, it is clear that “demolition” is part of another sector described in section 119, in this case the industrial, commercial, and institutional (“ICI”) sector of the industry. This sector and the designation scheme were recently described by the Board in *Metropolitan Toronto Demolition Contractors’ Association* [1993] OLRB Rep. July 612:

21. We therefore commence with some general observations concerning the nature and purpose of the province-wide bargaining provisions and the designation orders.

22. The legislative purpose of the province-wide bargaining provisions of the Act (which were first added to the Act by the *Labour Relations Amendments Act*, [1977] S.O. c. 31 (“Bill 22”)) was “first to recognize existing bargaining rights and patterns in the ICI sector and then to structure around them a province-wide bargaining regime, the objective of which was to stabilize the collective bargaining process in this significant sector of the construction industry.” (See *Manacon Construction Limited*, [1983] OLRB Rep. March 407 at para. 30).

23. In *Lumber and Sawmill Workers Union, Local 2693*, [1987] OLRB Rep. Dec. 1556 the Board referred to the province-wide bargaining scheme in the following manner:

13. *Provincial bargaining in the ICI sector is structured essentially on a multi-employer single trade basis.* There are, however, a number of departures from the principle of single-trade bargaining. These exceptions reflect the fact that at the time provincial bargaining was introduced, certain construction trade unions represented ICI employees outside of their "normal" trade or classification. For example, the Labourers Union represented units of plasterers as well as units of employees engaged in restoration and waterproofing work, often referred to as "steeplejacks", both of which groups had traditionally been represented by the Operative Plasterers and Cement Masons International Association of the United States and Canada. Because of this, the designation for the labourers employee bargaining agency covers not only labourers, but the other two classifications as well. Similarly, in recognition of the fact that the International Union of Bricklayers and Allied Craftsmen has traditionally represented plasterers in certain parts of the province, the bricklayers employee bargaining agency designation refers to plasterers as well as to bricklayers and stonemasons.

(emphasis added)

24. Generally however the thrust of the current designations is to encourage *single trade* bargaining by the designated employer and employee bargaining agencies (EBA's). As a result of this emphasis on single trade bargaining the designations upon which the scheme of province-wide bargaining is founded are generally based on a "craft" rather than a task or work function basis. In its decisions the Board also strives to promote the concept of single trade bargaining by the designated EBA's. Thus, in the ICI sector, the Board dismisses applications for certification by building trades "across craft lines". That is to say, union's bound by the scheme of province-wide bargaining cannot represent classifications of employees not referred to in their designation orders (see *Manacon Construction Limited, supra*, application for reconsideration dismissed, [1983] OLRB Rep. July 1104).

25. Again in *Lumber and Sawmill Workers Union, Local 2693, supra*, the Board expressed this concept as follows:

15. Section 146(2) prohibits an affiliated bargaining agent from entering into a collective agreement that is not a provincial agreement. The wording of this section has led the Board to conclude that a local of a building trades union which meets the definition of an affiliated bargaining agent cannot enter into a valid collective agreement for a trade or classification not referred to in the relevant employee bargaining agency designation. Following from this conclusion, the Board has on a number of occasions dismissed applications for certification by building trades unions "across craft lines". Accordingly, bargaining rights for an unrepresented unit of employees in the ICI sector can only be obtained by the building trades union designated to represent the trade or classification involved, (i.e., bricklayers can only be represented by the Bricklayers Union), or by a non-building trades union outside the scheme of provincial bargaining.

26. We find it also appropriate to note that there is a distinct difference between the representational rights which flow from the certification (or voluntary recognition) of a trade union within the parameters of the province-wide scheme of bargaining and the designation orders, and the work jurisdiction claims of a trade union (see, for example, the comments of the Board *In The Matter Of Certain Designations And Certain Employee And Employer Bargaining Agencies* [1980] OLRB Rep. Apr. 497; *Superior Plumbing and Heating Company Limited*, [1986] OLRB Rep. Nov. 1589). We agree with the submissions of the Insulators that the work jurisdiction claims and the representational rights of a particular trade union are not co-extensive and should not be treated as synonymous. Moreover, we note that the Act contains detailed provisions designed to resolve issues arising out of competing jurisdictional work claims (see section 93 of the Act). It is our view that it is inappropriate to resolve or attempt to resolve competing work jurisdiction claims in the context of these proceedings in the face of these specific legislative provisions.

27. With respect to the difference between representational rights and work jurisdiction claims we note that the designation orders summarize a trade or a craft in a very general way without particularizing the jurisdictional claims of that trade or craft. To take an example unrelated to this matter, the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada and the International Brotherhood of Boiler-makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (amongst others) both assert work jurisdiction claims over welding and welders. The designation orders of the Minister which relate to these two craft unions, and the certificates as bargaining agents granted by the Board to these two unions, do not however refer explicitly to welders. Rather, in claiming welding work each of these two craft unions rely upon assertions that the performance of the skill or work in question is part of their designated craft. It is important to keep this distinction between representational rights and claims to work jurisdiction in mind especially when addressing the issues as to whether asbestos removers are a trade or craft, or whether asbestos removal is a discrete segment of the construction industry.

11. Thus the ICI sector is governed by a “designation” system. In *Kraft Construction (1978) Ltd.* [1989] OLRB Rep. Feb. 169, the Board wrote:

5. Section 144 covers all applications for certification in the construction industry (see *Clarence H. Graham Ltd.*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Ltd.*, [1983] OLRB Rep. March 407 and July 1104). Under the province-wide bargaining provisions of the Act, some trade unions are designated to represent certain specific trades or crafts in bargaining in the industrial, commercial and institutional (“ICI”) sector of the construction industry. A trade union represented by a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and which are therefore not covered by sections 144(1) through (4) of the Act, such as the Christian Labour Association of Canada, can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

6. The designation orders (which are issued pursuant to section 139(1) describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of crafts or trades, and designate, for each such bargaining unit, an employer and an employee bargaining agency. In effect, such order designates the trade(s) or craft(s) which “belongs” to each employee bargaining agency and its affiliated bargaining agents. Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a craft or trade they have been designated to represent (see *Ninco Construction Ltd.*, *supra*, *Manacon Construction*, *supra*, *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D.E. Witmer Plumbing and Heating Ltd.*, [1987] OLRB Rep. Oct. 1228). In fact, the structure of the Act requires an employee bargaining agency to represent all parts of the trade(s) or craft(s) it has been designated to represent in ICI bargaining. Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe an ICI sector bargaining unit in a manner which is inconsistent with the relevant designation order. To accommodate this designation system, and recognizing that trade union representation of the construction industry has historically been along trade or craft lines, the Board’s general practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade in using the words of the relevant designation order. Further, the Board has held that where a trade union seeks to be certified for a bargaining unit limited to a particular craft or trade (as an affiliated bargaining agent must do in an application which relates to the ICI sector of the construction industry), all employees pertaining to that trade or craft who are at work on the date of application must be included in the bargaining unit for certification purposes (see, for example, *Dufresne Piling Co.*, (1967) Ltd., [1984] OLRB Rep. July 924).

12. The concept of a “designation” under the Act is limited to the ICI sector: all designations are issued (pursuant to section 141), and can only be issued, for the ICI sector. When the ICI province-wide scheme was first implemented in 1978, the Minister issued a series of designations, with respect to Employer Bargaining Agents, Employee Bargaining Agents, and Affiliated Bar-

gaining Agents. The initial Labourers' designation (for our purposes here) specified that the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council were (together) the Employee Bargaining Agency for representing in bargaining all "construction labourers, including masons' or bricklayers' tenders, and employees engaged in cement finishing, waterproofing or restoration work ...". Although the designation afforded special treatment to concrete forming construction and the agreement between certain Labourers' Locals and the Ontario Form Work Association, no mention was made of the Demolition Agreement or the long-standing bargaining relationship between the Labourers' and the Metropolitan Toronto House Wreckers Association (predecessor to the Metropolitan Toronto Demolition Contractors Association).

13. In a new designation issued September 30, 1983, the Minister did recognize (amongst other matters) that ICI demolition was special, amending the prior Labourers' ICI designation to exclude from its application this particular bargaining relationship.

14. However, shortly thereafter, around June, 1984, correspondence was directed to the Minister by both the Metropolitan Toronto House Wreckers Association and the Labourers', requesting a further amendment to the designations "in regard to that relationship particularly described in terms of the Collective Agreement ...". There followed a significant period of exchange of correspondence with the Minister's office, both from the parties and from other trades. The Labourers' and the Metropolitan Toronto Demolition Contractors (the new name for the association of demolition contractors) requested a revised designation naming new E.B.A.'s and enshrining the current practice. They noted that, almost without exception, demolition contractors were bound to a demolition agreement with the Labourers' under which the parties had agreed to an "all employee" bargaining unit. Under the agreement, the Labourers' were entitled to perform the work of all other trades on demolition projects. This had been the long-standing practice in the industry, they asserted. The evidence before us is limited in this respect, but the Carpenters' union (at least) opposed a revised designation, and argued that any new designation ought not to cover "all employees".

15. In the result, the Minister issued a new designation on January 23, 1986, which designated the Labourers' International and the Labourers' Ontario Provincial District Council as the employee bargaining agency "to represent in bargaining construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the industrial, commercial and institutional sector of the construction industry ..." (emphasis added). The Labourers' were not designated to represent employees other than "construction labourers".

16. The current demolition designation has significance for jurisdictional disputes. Although demolition work can be (as it is here) construction within the ICI sector, it has been afforded selective treatment under the designation system. The Minister, through the power to designate bargaining agents in the ICI and to describe provincial units (s. 141), has recognized that demolition is a specialized type or part of ICI sector construction work. The historical reality is that there has been a special bargaining relationship between the Labourers' and the Metropolitan Toronto Demolition Contractors with respect to demolition work, and the legal framework has now acknowledged that fact.

17. How does this distinct designation impact on work assignment disputes? Until now, the Board has not considered the parameters and significance of practice evidence in demolition project jurisdictional disputes. In other ICI contexts, the Board has in recent years increasingly come to rely on the relevant employer and area practice in determining the correct assignment. The Board has also increasingly come to place significant weight only upon practice within the

Board Area in question (see, for example, *Commonwealth Construction Company*, [1991] OLRB Rep. June 742). For ICI projects then, the Board has focused primarily on ICI past practice within the project's Board Area. Further, the Board has relied upon evidence of all types of ICI work, regardless of the type of ICI project. Thus, the Board has rejected the argument that the food or automotive industries represented a meaningful subset of ICI practice within a Board Area (*Comstock Canada*, [1993] OLRB Rep. Aug., 740).

18. In our view, the Board's approach must be different when disputes arise over work performed on demolition projects. For the reasons recited above, demolition is an acknowledged, distinctive part of ICI construction. It follows that practice evidence related to demolition projects or sites will be of particular relevance. This relevant practice evidence will be, as it is here, the evidence of employer or area practice on demolition projects only. We see nothing in the current designation or construction industry practice which suggests that this demolition practice ought to be restricted to projects engaged in by speciality or demolition contractors.

19. Consistent with the Board's developing approach to disputes arising in the ICI sector, the relevant past practice will ordinarily be limited to practice that arose in the particular Board Area in question. To look at area practice that occurred outside the Board Area would be counter-productive. Where the trades have largely resolved a work assignment problem within a Board Area, the Board will not lightly disrupt their arrangement. To rely upon practice in other Board Areas in these circumstances will only lead to increased disputes and litigation, and less certainty and predictability for contractors making assignments. Both contractors with a history in the Board Area and those newly arrived are better served by a jurisprudential approach that gives pre-eminence to the local allocation system. Similarly, protocol focused upon local practice better serves the local trades, and their players, and enhances the eventual resolution of jurisdictional disputes.

20. Although there will continue to be instances in which employer practice outside the particular Board Area remains of assistance, in the circumstances before us, we have not found it to be particularly helpful, given our conclusion that there exists meaningful ICI practice evidence within Board Area 1.

21. Accordingly, we conclude here that we ought to look initially to demolition project practice within Board Area No. 1. If this practice evidence is not sufficient to enable the Board to dispose of the matter, we will look next to other ICI practice within Board Area No. 1. Again, demolition is a subset of, a type or part of, ICI construction.

22. We turn to the facts. The project in question can be described as a "two-way project", involving both the demolition of the existing building, and the construction of a new structure on the same site. All this work falls within the ICI sector. The hoarding here does not consist merely of plywood sheets erected in place, but of a hoarding with protective canopy and walkway. In this Board Area, demolition site hoarding has more commonly consisted of plain plywood sheets, wire fences, or snow fences. Although we were initially of the view at the consultation that, colloquially put, "hoarding is hoarding", the submissions of the parties have convinced us otherwise. We therefore assess this dispute in the context of the particular type of hoarding.

23. It does not appear as if there have been any demolition projects, either by Delsan or any other contractor, in Board Area No. 1 which have involved the erection of similar hoarding. The Labourers' have regularly erected hoarding in Board Area No. 1 on demolition projects, but it has not been of the type in question. While the Labourers' did file an additional list of job projects shortly before the date of the consultation, the information contained therein is insufficient to establish that the Labourers' have a practice of erecting such hoarding on demolitions projects in Board Area No. 1.

24. Similarly, the Carpenters have no established practice of performing this work on demolition projects in Board Area No. 1.

25. For the reasons expressed above, we look next to non-demolition ICI practice in Board Area No. 1. The prevailing practice where hoarding of this nature has been erected has been for members of the Carpenters to have performed the work. In contrast, there does not appear to be any reliable practice evidence indicating that the Labourers' have erected such hoarding in Board Area No. 1. Past practice strongly suggests that this assignment should have been made to the Carpenters.

26. Delsan, supported by the Labourers', argued that the skills required for demolition were different than in other types of ICI construction, and more specifically, that it required demolition labourers in order to properly perform the work in dispute. We do not agree. Here, clearly, both trades are fully capable of erecting the hoarding in question, and have the requisite skills and ability.

27. The employer asks the Board to endorse an assignment which, from the employer's perspective, is more efficient and economical, and enhances its competitive position. If the employer is able to continue to use a "wall-to-wall" labourers workforce, it will no doubt be less expensive for the employer to perform its demolition projects. This is not an unreasonable concern or proposition. But as was noted earlier in the quotations from prior Board decisions, the industry is statutorily set up and regulated on a single trade basis, not a multi-trade single employer basis. That latter approach led to years of construction industry discord and work interruptions, and greater costs for all participants. The industry is now divided on a trade basis, as reflected by the designation system and the many years of Board's jurisprudence in jurisdictional complaints.

28. Again, significantly, the new demolition designation continues this trade division. The Labourers' are designated only to represent "construction labourers" in demolition. This designation is therefore consistent with the overall designation scheme of ICI rights within the province, which, generally speaking, describe or assign representational rights on a trade basis. Within demolition, the Labourers' can *only* acquire bargaining rights in certification applications for "construction labourers" (see *Superior Plumbing*, [1986] OLRB Rep. Nov. 1589). There is little to be said for the argument (asserted by the Labourers') that the Labourers' are exclusively entitled to perform all tasks "wall to wall" on demolition projects, even where this involves performing the work of other trades. To the contrary, the Labourers' were only designated to represent "construction labourers". To accede to this argument would be to effectively rewrite the designation in terms of "all employees". Designation amendments are the prerogative of the Minister, and here the Minister has specifically designated otherwise.

29. For our purposes, the Labourers' have not been granted exclusive rights to all demolition work, but only rights to perform the work of "construction labourers". Other trades also have claims and the skill and ability to perform demolition work.

30. Here, both unions have bargaining relationships with the employer, and both have a reasonable claim to perform the work. The relevant Board Area practice demonstrates that historically this has been work performed by Carpenters. To give prevailing weight to employer preference in such a context would be to render meaningless the historic division between the trades in the Board Area in question. Rather, we conclude that the assignment ought to have been made on the basis of the predominant practice in Board Area No. 1, which is that the Carpenters have performed this work.

31. We are concerned by the fact that segments of the hoarding will have to be removed

periodically, during the demolition phase of the construction, in order to provide access points for certain pieces of heavy machinery and exit points for various materials. Delsan submitted that it made no sense for members of a different trade to erect the hoarding than would later be required to temporarily remove part of the hoarding. We note that the Carpenters have explicitly acknowledged that they are not claiming the work beyond the initial erection of the hoarding. The Carpenters have recognized the need and justification for the employer to utilize the Labourers' members to perform such subsequent temporary removal and re-erection of parts of the hoarding. Further, given the nature of the hoarding and the skills and abilities of both trades, we are satisfied that members of the Labourers' will be able to efficiently and effectively temporarily remove parts of this type of hoarding and later refasten them, even though they might not have initially erected the hoarding.

32. In the result, the Board concludes that the work in dispute was improperly assigned. Therefore, pursuant to the provisions of section 93 of the *Labour Relations Act*, the Board directs that:

"Delsan Demolition Limited shall assign to a crew composed of members of Carpenters, Local 494 all work in connection with the initial construction and erection of the wooden hoarding with a covered walkway or canopy around the site of the former Steinberg building at Goyeau Street and Chatham Street in Windsor, Ontario."

3256-91-G International Union of Operating Engineers and it's Local 793, Applicant v. E. S. Fox Limited, Responding Party

Construction Industry - Construction Industry Grievance - Damages - Remedies - Board earlier finding employer in violation of collective agreement and awarding damages - Board rejecting argument that employer ought to be relieved of its obligations to compensate for damages arising out of its violation of the collective agreement because it elected to use fewer employees on the job than it was required to pursuant to the terms of the collective agreement - Board rejecting argument that damages ought not to be paid to the union but, rather, directly to members who would have been employed or, alternatively, to union in trust on behalf of those *specific* members - Employer directed to pay quantified damages to union in trust on behalf of its members

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *B. L. Armstrong*.

APPEARANCES: *Larry Steinberg* and *James Anderson* for the applicant; *W. J. McNaughton* and *H. Miron* for the responding party.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER B. L. ARMSTRONG; October 19, 1993

1. In the Board's decision dated April 21, 1993 [now reported at [1993] OLRB Rep. Apr. 321], the majority of the Board (Board Member F. Reaume dissenting in part) found that the responding employer ("E. S. Fox" or "the employer") had violated the terms of the Operating Engineers province-wide collective agreement to which it is bound when it failed to employ members of the applicant trade union ("the union" or "Local 793"). The Board remained seized of the issue of damages.

2. The parties were unable to resolve the issue of damages. As a result the matter was re-listed and came on for hearing before the Board on August 10, 1993. At the time the Board heard the submissions and representations of the parties. As there was substantial agreement between the parties regarding the quantum of damages, it was not necessary to hear any *viva voce* evidence.

3. The parties agreed that the total amount of damages owing as a result of the violation of the collective agreement was \$126,879.82. In arriving at this figure the parties agreed that the appropriate formula for the calculation of damage was that found in *Blouin Drywall*, 1973 4 L.A.C. (2d) 254 (O'Shea) rev'd 1973 4 O.R. (2d) 423 (H.C.J.) rev'd 8 O.R. (2d) 103 (C.A.) leave to appeal to S.C.C. refused i.e., the number of hours worked by persons who were not members of the union multiplied by the applicable rates (wages and benefits) which would have been paid to union members employed on the site had the collective agreement been applied properly.

4. Counsel for E. S. Fox asserted that the amount of \$33,170.40 ought to be deducted from the total agreed upon. This figure represents the total amount which the parties agree would have been paid to an "apprentice, oiler or oiler driver" if the collective agreement had been applied and a person in that classification had been engaged. Article 26 of the collective agreement states:

26.1 (a) The parties agree that the following formula will be used for the purpose of manning certain equipment set out in the Classification 1 and 2 of the attached Schedules, save and except Schedule "C".

(b) It is further agreed that this formula shall apply to each Employer on any one job.

(c) The following shall be manned by one (1) operator and one (1) apprentice, oiler or oiler driver.

(ii) All crawler cranes with a manufacturer's rating of 70 tons capacity and over.

Counsel for E. S. Fox submits that as no apprentice, oiler or oiler driver was actually employed on the job site damages should not be awarded.

5. There is no dispute that a crawler crane with a manufacturer's rating of over 70 tons capacity was used on the job. The terms of the collective agreement are clear and unambiguous. If such a piece of equipment is used an apprentice, oiler or oiler driver must be employed. Had the collective agreement been properly applied by the employer an apprentice, oiler or oiler driver would have been working at the site. Under the terms of the collective agreement that apprentice, oiler or oiler driver was required to be a member of Local 793. The employer is not relieved of its obligations to compensate for damages arising out of its violation of the collective agreement merely because it elected to use fewer employees on the job than it was required to do pursuant to the terms of the collective agreement. Accordingly we reject the employer's submissions that \$33,170.40 ought to be deducted from the total amount and find the damages to be \$126,879.82.

6. The parties also disagreed as to whether the total amount agreed upon should be reduced by income tax or unemployment insurance benefits, and to whom the payment should be made.

7. Counsel for E. S. Fox argued that pursuant to section 153(1) of the *Income Tax Act*, income tax must be withheld at the source of payment and remitted to the Receiver General. Section 38 of the *Unemployment Insurance Act* also provides that deductions at the source of payment must be made and remitted to the Receiver General as repayment of an over payment of benefits.

8. Counsel for the employer argues that the rationale underlying the calculation of dam-

ages in *Blouin Drywall, supra*, is to compensate those individual union members who have suffered the damage. The *Blouin Drywall* policy is designed to put the individuals who would have been hired to do the work in the same position as they would have been in had the employer properly applied the collective agreement and had they actually performed the work. The employer argues that therefore it is not appropriate to merely direct the payment of \$126,879.82 to the trade union. It is not the trade union which suffered the damages. The union members who would have been employed at the project suffered the damages. In the result the money owed should be paid directly to those members or alternatively paid to the union in trust on behalf of those specific members. Appropriate statutory deductions must be made by the employer before the money is paid out.

9. Counsel for E. S. Fox asserted that in a hiring hall situation there is no speculation about which individuals would have performed the work. The trade union can easily ascertain which of its members would have been dispatched to the job. Counsel for the employer argues that it is therefore more appropriate for the trade union to advise the employer which members would have performed to work so that the employer can then make the payments to those members less the statutorily required deductions.

10. Counsel for E. S. Fox states that this is the correct and more appropriate method to pay damages because of the statutory obligations imposed on an employer under section 153(1)(c) of the *Income Tax Act* and section 38 of the *Unemployment Insurance Act*. Counsel submits that these statutory provisions impose a obligation on the employer (a) to withhold and remit to the Receiver General income tax on monies paid out, and (b) to withhold and remit to the Receiver General the required amounts if the individuals ultimately receiving the damages obtained unemployment insurance benefits for any period of time covered by the damage award. The employer submits that if this method of paying the award of damages is not used the employer *may* be statutorily liable for taxes or unemployment insurance benefit overpayments in the event the individuals who ultimately receive the funds do not of their own accord make the remittances required of them under the legislation.

11. Counsel for Local 793 argues that section 153(1)(c) of the *Income Tax Act* and section 38 of the *Unemployment Insurance Act* have no application. Counsel for Local 793 submits that the grievance was filed by the trade union on behalf of its members. Any damages payable are therefore payable to the union in trust on behalf of its members. As the trade union is not a claimant under the *Unemployment Insurance Act* (nor a recipient of unemployment insurance benefits), and is also not a recipient of “income from unemployment”, which is taxable under the *Income Tax Act*, there is no issue with respect to the employer’s liability for failure to withhold and remit any statutorily required amounts to the Receiver General. He notes also that in any event these statutory obligations are dual obligations imposed on employers and employees alike. They can therefore be met by the union member recipients who will ultimately receive the funds.

12. In the result the trade union argues the Board should simply direct the money to be paid to the trade union in trust. Counsel urged the Board to “let the trade union worry about the distribution” of the damages and the individual union members “worry about their statutory obligations”.

13. The parties also disagreed about the calculation of interest. The parties dispute with respect to the appropriate calculation of interest is related directly to their dispute about the method of payment and the distribution of the damages owed.

14. Counsel for the employer asserts that the Board’s policy in awarding interest as set out in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35 is based on the desire to compensate. As a

result interest should only be awarded on the amount of money actually received by the individual union members, i.e., interests should be paid only on the amount remaining after the statutory deductions and remittances have been made. Counsel asserts that interest should not be paid on amounts that the employee would not have received in any event such as the amount ultimately deducted for income tax purposes, nor should interest be paid on those monies which the employer must deduct and remit to the Receiver General because an employee received unemployment insurance benefits during a period of time covered by the damage award. The employee has not lost the use of these monies.

15. The trade union asserts that the *Hallowell* calculation of interest is a sort of “rough justice” which already takes into account that deductions are made from the damages awarded. It is therefore appropriate and contemplated by *Hallowell* that interest is calculated on the total amount awarded and not on the total amount of damages less statutorily required deductions.

16. The parties did not provide the Board with either copies of the relevant statutory provisions or any caselaw, arbitral jurisprudence, legal text or other authority to support their respective positions.

17. The Board has reviewed the relevant statutory provisions. We have also considered *Trelford Automobile Limited*, [1991] OLRB Rep. Oct. 1225 and the decisions referred to in paragraph 27 therein. We have also considered the discussion of this topic as found in Brown & Beatty, *Canadian Labour Arbitration*, 3rd edition at Topic 2:1416.

18. The issues raised by the parties with respect to the proper procedure to be followed by the Board in awarding damages are far from clear. The issues are largely dependent on the correct interpretation and application of such statutory terms as “income from employment” in the *Income Tax Act*, and “earnings” in the *Unemployment Insurance Act*. In our view those issues cannot, and should not, be determined by this Board. Whatever may be the requirements of the employer, the trade union or its individual members as to the payment obligations of any of them is a matter between the government agencies responsible for administering those statutes and the employer, trade union and individual trade union members who may receive monies as a result of this award. From a labour relations and collective agreement administration perspective the payment can best be characterized as damages payable to the union which filed the grievance in trust on behalf of its members.

19. Accordingly we direct E. S. Fox to pay to the union in trust on behalf of its members the sum of \$126,879.82. We further direct E. S. Fox to notify the local Unemployment Insurance Commission and local Revenue Canada taxation office of this payment to the union.

20. With respect to the issue of interest we direct that interest on the amount of money relating to damages as a result of the employer’s failure to remit contributions, deductions or remittances for the health plan, the pension plan, dues, fees or assessments pursuant to Article 3 of the collective agreement, I.U.O.E. Local 793 trades training fund pursuant to Article 14 of the collective agreement, working dues check-off or employer labour relations fund shall be paid in accordance with Article 24.4 of the province-wide collective agreement. Interest on the remainder of the funds shall be paid in accordance with the formula set out in *Hallowell*.

DECISION OF BOARD MEMBER FRED B. REAUME; October 19, 1993

1. Subject to my dissent on the grievance decision in the first instance, I cannot disagree that the \$33,170.40 should be included in the calculation of damages which the parties agreed to in

the amount of \$126,879.82 and that the calculation of interest should be as per paragraph 20 of the majority decision.

2. However, I do not agree that the payment is properly directed to the union rather than directly to those union members said to have been injured by the alleged violation.

3. The employer quite properly submits that it *may* be statutorily liable for taxes or unemployment insurance benefit overpayments if the persons who ultimately may receive these funds do not properly declare same. This serious social disutility can be readily avoided by both parties simply by having payment go directly to the individual members in whose hands the appropriate monies would be immediately taxable and who would be required to reimburse the public purse for any unemployment insurance benefits received at that time. In addition these members would be credited with the appropriate welfare and pension contributions where applicable.

4. As a result, I would have directed that the union provide E.S. Fox with a list of the members who would have performed the work together with their allocated hours up to the total hours, such hours to be paid by E.S. Fox as per the normal payroll procedure including deductions and contributions as required under the applicable collective agreement and statutory requirements. At the very least, this majority award should have included a further requirement that the union advise E.S. Fox, Revenue Canada and UIC in writing of the distribution of the funds within 30 days of receipt of the funds.

1480-93-U Errol McKenzie Kettell, Applicant v. Fortinos Supermarket Limited, Responding Party v. United Food & Commercial Workers International Union, Locals 175/633, Intervenor

Adjournment - Arbitration - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board adjourning applicant's unfair labour practice complaint *sine die* pending completion of arbitration process - Board to deal with case after arbitrator's decision if necessary to do so - Board directing that copies of its decision be posted in workplace

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. N. Fraser* and *K. Davies*.

APPEARANCES: *Errol McKenzie Kettell* appearing on his own behalf; *Malcolm MacKillop*, *Lucy Caluori*, *Charles Alfano*, *Arnold Mooney* and *Dwayne Peterson* for the responding party; *Kelvin Kucey* for the intervenor.

DECISION OF THE BOARD [ORALLY]; October 27, 1993

1. This is an application under section 91 of the *Labour Relations Act*. The applicant contends that the responding employer has contravened section 67 of the Act. The relevant provisions of the Statute read, in part, as follows:

91.-(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

2. A hearing in this matter was held, in Toronto, on Wednesday, October 27, 1993. After receiving the parties' representations, the Board made the oral ruling set out below.

- (1) There is really no dispute that the Board has *jurisdiction* to receive the parties' evidence and determine whether there has been a breach of the *Labour Relations Act*. However, the exercise of that jurisdiction is discretionary. Under section 91, the Board has a discretion whether or not to inquire into a particular complaint, and if it decides to do so, it controls its own practice and procedure - that is, it can decide when and how it will hear the parties' allegations.
- (2) Having reviewed the material filed by the parties in this proceeding and considered their representations, we are not persuaded that the exercise of statutory rights is central to the current controversy - much of which has to do with work practices, work regulations, and the way in which employees have gone about their work. This is not like a discharge in the context of an organizing campaign where bargaining rights have not yet been established and employees may have real fear about their job security. Nor is this a new or fragile collective bargaining relationship. The parties have an established collective bargaining relationship and will soon be negotiating another collective agreement.
- (3) This application raises no policy questions or issues central to the administration of the *Labour Relations Act*. There is nothing that requires the experience or expertise of the Labour Relations Board, nor anything to suggest that the Board is the preferred forum.
- (4) The company's response to the applicant's alleged misconduct was a one-day suspension, so there is no continuing loss or hardship. The union is not deprived of the applicant's presence in the workplace, nor is the grievor or anyone else seriously impeded in the exercise of statutory rights. The employer and the terms of a collective agreement both recognize that union stewards are entitled to file grievances and pursue health and safety issues in the workplace. The com-

pany acknowledges and agrees that employees cannot be disciplined or penalized for pursuing such claims.

- (5) Interestingly, the union in this case is not the moving party and no one is pleading section 66 of the Act which deals specifically with interference with the representation of employees.
 - (6) We are satisfied that an arbitrator is fully empowered to consider and resolve the issues in dispute between these parties in this case - particularly in light of the extended powers granted to arbitrators under Bill 40. Indeed, the jurisdiction of the Board of Arbitration would appear to be broader than that of the Labour Relations Board, because the collective agreement contains both a "no discrimination clause" and a "just cause clause". In an unfair labour practice, the Board's focus is trade union activity; while under this collective agreement, the arbitrator's focus can be what might be described as the "general justice of the grievor's treatment". Arbitration is readily available and we are not persuaded that there are any remedial difficulties or deficiencies.
 - (7) Finally, it makes no sense from either an economic or labour relations perspective to multiply the layers of litigation, yet the union's position is that a two-stage process is necessary. We do not agree that such duplication is desirable. We are not persuaded that, at this stage, we should embark upon a parallel proceeding.
 - (8) While in another case it may be appropriate to re-visit [the Board's analysis in] *Valdi*, and explore the relationship between statutory rights and those under a collective agreement - particularly in light of Bill 40 - we do not think that this is the appropriate case to do so. For the foregoing reasons, this matter is adjourned, *sine die*, pending completion of the arbitration process. The Board will deal with the case after the arbitrator's decision if it is necessary to do so; and, for that purpose, the Board will remain seized. However, this particular panel will not be seized.
 - (9) Finally, lest there be any dispute about what has happened here today, we direct that a copy of this decision be posted on employee bulletin boards or similar places where they will come to the attention of employees who might be interested.
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0732-93-M Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO), Applicant v. **London Free Press Printing Company Limited**, Responding Party

Bargaining Unit - Employee - Employee Reference - Practice and Procedure - Employer objecting to application under section 108(2) of the Act on ground that application relates to persons in positions specifically excluded from bargaining unit - Where Board is satisfied that application under section 108(2) raises real "employee" issue, Board will proceed with it, even where "real" issue is whether that person is or should be in a bargaining unit, unless there is a cogent reason not to - Board doubting whether section 108(2) giving Board discretion to refuse to entertain application on basis that "real" issue is something else - Board disagreeing with decisions seeming to suggest that Board determination that person not "employee" not necessarily meaning that that person not in the bargaining unit

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

DECISION OF THE BOARD; October 5, 1993

1. This is an application, under section 108(2) of the *Labour Relations Act*, in which the applicant trade union seeks a declaration that certain individuals are "employees" within the meaning of the Act. It is apparent that the real dispute between the parties is whether or not these persons are in the bargaining unit of employees of the responding employer for which the applicant is the bargaining agent.
2. The applicant asserts that the persons whose "employee" status is in dispute between the parties are Jane Bradley, Alan Bass, Tess Kalinowski, John Miner, James Reaney (all of whom it refers to as "Section Editors"), Paul Gartlan (referred to as a "Production Editor"), Bill McGrath ("Art Director"), Gord Sanderson ("Readers' Advocate") and Norma Beer ("Secretary").
3. The responding employer submits that the application should be dismissed.
4. Both parties have filed extensive written submissions with respect to the responding employer's request that the application be dismissed.
5. There are two bases upon which the responding employer rests its request to dismiss.
6. First, it asserts that the issue of the disputed "positions" was raised during the recent collective bargaining between the parties in the context of an attempt by the applicant to negotiate changes to the recognition clause in the collective agreement. The employer asserts that in the course of those negotiations the applicant agreed to withdraw that issue (among others) in exchange for certain unspecified concessions from the employer. In effect, the employer asserts that the issue raised in this application has been settled for the term of the present collective agreement between the parties and should therefore not be entertained by the Board.
7. Second, the employer relies on the Board's decisions in *Thomson Newspapers Company Limited (The Globe and Mail Division)* (Board File No. 0639-92-M, July 27, 1992 and Oct. 6, 1992 (reconsideration), both unreported), and submits that as in that case, this application relates to persons in positions which have been specifically excluded from the bargaining unit in the recognition clause in the collective agreement between the parties.

8. The applicant agrees that the issue of whether the persons who are the subject of this application, and the positions they occupied, “should be” in the bargaining unit was raised in the course of the recent collective bargaining between the parties. However, it asserts that it suggested that the parties try to resolve the “exclusions” issue in negotiations, failing which the applicant would bring the section 108(2) application to the Board. The applicant states that when the parties were unable to resolve this issue in collective bargaining, it withdrew the “exclusions” issue from the bargaining table as part of a settlement proposal with respect to several issues but without prejudice to its position and right to bring this application. The applicant submits that there is no merit to the employer’s estoppel-like argument and that nothing which the union has done should operate to bar this application.

9. In response to the second basis asserted by the employer for its dismissal request, the applicant seeks to distinguish this application from the one in *Thomson Newspapers, supra*, or to bring it within the exceptions it submits the decision in *Thomson Newspapers, supra*, contemplates.

10. Section 108(2) of *Labour Relations Act* provides that:

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

11. As the Board observed in *Thomson Newspapers, supra*, section 108(2) of the Act does not empower the Board to determine whether or not a person or position is or should be in a bargaining unit. The Board has only the much more limited jurisdiction to determine whether a “person” (not a “position” - see *Royal Mattress Limited*, [1987] OLRB Rep. Dec. 1605) is an “employee” or “guard”. The question of whether an “employee” or “position” is in a bargaining unit is an issue for negotiation or arbitration, for which an application to the Board under section 108(2) is not a substitute.

12. As the Board also noted in *Thomson Newspapers, supra*, the Board cannot alter or amend an existing bargaining unit except as authorized by the *Labour Relations Act* (see, for example, sections 7, 64 and 93 - none of which are applicable here). Section 108(2) neither gives the Board any such jurisdiction nor provides a mechanism for dealing with concerns or disputes with respect to an existing bargaining unit.

13. In *Thomson Newspapers*, the Board also stated that in cases in which it appears that the real dispute between the parties is whether or not the person(s) with respect to whom a section 108(2) application is made is in a bargaining unit, there is an onus on the applicant to satisfy the Board that there is a real issue between the parties with respect to “employee” (or “guard”) status of the person(s) in question and that a determination by the Board in that respect will have some labour relations value.

14. We agree that there must be a “question” between the parties regarding the “employee” or “guard” status of a person before the Board has jurisdiction to deal with the matter under section 108(2) of the Act. However, once the Board is satisfied that an application under section 108(2) raises a real “employee” or “guard” issue, the Board will proceed with it, even where the “real” issue is whether that person is or should be in a bargaining unit, unless there is a cogent reason not to. It is not apparent that section 108(2) gives the Board a discretion to refuse to entertain an application on the basis that the “real” issue is something else. Further, the parties, not the Board, are in the best position to assess the labour relations value of a section 108(2) determination by the Board.

15. In that latter respect, we note that the Board's section 108(2) jurisprudence makes it clear that a determination by the Board under section 108(2) will not necessarily be determinative of a bargaining unit issue regarding the person(s) whose "employee" (or "guard") status has been determined by the Board. However, to the extent that some Board decisions seem to suggest that a determination by the Board that a person is not an "employee" does not necessarily mean that that person is *not* in the bargaining unit, we disagree. Under the *Labour Relations Act*, only persons who are "employees" within the meaning of the Act can be in a bargaining unit. Persons who are not "employees" may be entitled to benefits under a collective agreement as a result of having been an employee or having some connection with an employee in the bargaining unit covered by the collective agreement (including, for example, persons who have been laid off, retirees, spouses or other family members). However, the scheme of the *Labour Relations Act* is such that only persons who are "employees" can actually be in a bargaining unit. Accordingly, a determination by the Board that a person is not "employee" will also be dispositive of a dispute with respect to whether such a person is in a bargaining unit. That is not necessarily so where the Board finds that the person in question is an "employee". Further, a determination by the Board that a person is an "employee" may be of assistance to the parties dealing with the bargaining unit issue in collective bargaining, or may be of assistance or necessary before such a dispute can be arbitrated.

16. In addition, the decisions in *Thomson Newspapers, supra*, were based in large part upon the Board's interpretation of the language in a collective agreement between the parties. As the Board itself has noted, disputes concerning the application or interpretation of a collective agreement are matters for arbitration, and it therefore seems to be inappropriate for the Board to enter into that arena in a section 108(2) application.

17. In the result, it is not at all clear that the Board should dismiss a section 108(2) application merely because it does not see the value of it, or because the collective agreement between the parties may specifically exclude the persons who are the subject of the application. Further, in this case, it is apparent that the workplace has undergone some reorganization and there is a dispute between the parties with respect to whether or not the persons with respect to whom this application has been made occupy new or different positions from those which the employer asserts are excluded from the bargaining unit, or whether they have different duties and responsibilities within positions which the employer asserts are excluded. That is, there is a dispute between the parties with respect to whether or not the persons who are the subject of this application occupy positions which have been specifically excluded from the bargaining unit. The dispute between the parties therefor appears to raise issues of collective agreement interpretation which may have to be arbitrated. However, with the possible exception of Gord Sanderson, the application does raise an issue, or "question" with respect to whether the named persons are "employees", which issue the Act provides may be referred to the Board.

18. But for the responding employer's assertion that the Board should not proceed with the application because it has been "settled" (see paragraph 6, above), the Board would authorize a Labour Relations Officer to inquire into and report to the Board with respect to the duties and responsibilities of the persons named by the applicant. However, if the employer's assertion in that respect is correct, it may be that there is no "question" within meaning of section 108(2) to be determined by the Board and that this application should be dismissed. In our view, that issue cannot be dealt with without a hearing.

19. The Registrar is therefore directed to schedule a hearing in this matter. The purpose of the hearing is to hear the evidence and representations of the parties with respect to the responding employer's request that this application be dismissed because the "question" raised in it has been settled in the sense described above.

20. Since a hearing is required in that respect, and because (as this decision indicates) there may be reasons to doubt the correctness of the approach taken in *Thomson Newspapers, supra*, the Board will entertain further submissions on the “specifically excluded in the recognition clause” issue if the parties wish to address further argument in that respect. (We note that it is neither necessary nor appropriate for either party to repeat the written submissions already made in that respect.)

3445-92-U Ontario Nurses’ Association, Applicant v. Oakville Lifecare Centre, Responding Party

Change in Working Conditions - Damages - Hospital Labour Disputes Arbitration Act - Remedies - Unfair Labour Practice - Board determining and declaring that certain scheduling changes affecting job sharing arrangements violating statutory “freeze” - Board declining to direct employer to restore previous work schedules in view of collective agreement made by parties subsequent to filing complaint, but directing that affected employees be compensated according to formula set out in decision

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *Jennifer Webster*, *Cindy Forster*, *Sue Fedun* and *Rose Foy* for the applicant; *Jean M. Butters* and *Stephen Picott* for the responding party.

DECISION OF THE BOARD; October 18, 1993

Introduction

1. This is an application filed pursuant to section 13 of the *Hospital Labour Disputes Arbitration Act* (“*HLDAA*”). The applicant Ontario Nurses’ Association (“*ONA*” or “the union”) complains that the responding party Oakville Lifecare Centre (“*Lifecare*” or “the employer”) has altered the hours of work of employees in the bargaining unit without its consent and contrary to section 13 of the *HLDAA* (“the freeze provision”).

2. Lifecare disputes that it has violated the *HLDAA* and asserts that it has merely continued to carry on business as usual, and in so doing has responded to certain economic circumstances affecting its operations. In addition Lifecare asserts that the scheduling changes about which the union complains were set in motion before the union’s certification application.

3. We note at the outset that the employer was not represented by counsel. At the commencement of the hearing the Board indicated that there was no requirement that persons appearing before the Board be represented by counsel. The Board often hears cases where one or more of the parties are not represented by counsel. The Board noted however that Board proceedings are legal proceedings and persons appearing on their own behalf do bear any risk involved with appearing on their own behalf. We indicated to the employer’s representative that the Board’s function is to adjudicate. It would be inconsistent with our role as adjudicators to become an advocate for, or adviser to, any party to the proceeding merely because that party was not represented by counsel. The Board did however explain the process typically followed in applications of this sort, the rights of the parties to lead *viva voce* and documentary evidence, to examine and cross-ex-

amine witnesses, to make submissions etc. We also indicated that if the employer's representative had any questions about the process to be followed during the course of the hearing we would attempt to answer those questions within the confines of our adjudicative role. Thereafter the hearing proceeded.

4. There is no dispute that section 13 of the HLDAA was in effect at the time Lifecare altered the hours of work of certain of its employees. It is also not disputed that the ONA filed its application for certification to represent registered nurses at Lifecare in December 1990. On February 4, 1991 it was certified on an interim basis. On February 11, 1991 the ONA sent its notice to bargain a first collective agreement to the employer. On March 20, 1991 the ONA was certified as bargaining agent for a full-time and a part-time unit of registered nurses. The alteration of hours about which the union complains was implemented in November and December 1992. This application was not filed until February 24, 1993. At that time the parties had not yet concluded their collective agreement negotiations.

5. It is also not disputed that Lifecare operates a facility which is comprised of a nursing home section consisting of 178 nursing home beds, a residential or retirement home section consisting of 22 to 24 beds, and a hospital wing consisting of 35 hospital beds. The hospital wing is directly funded by the Oakville Trafalgar Memorial Hospital ("OTMH"). The bargaining unit represented by the union is comprised of approximately 20 full-time and part-time nurses working throughout the facility.

HISTORY GIVING RISE TO THE CHANGES

6. The alteration of hours of certain employees about which the union complains occurred primarily as a result of a change in staffing patterns in the hospital wing of the employer, and an earlier determination by Lifecare to restructure certain job classifications within the facility. Both of these factors figured prominently in the employer's position with respect to this application and therefore require further elaboration.

7. Mr. S. Picott has been the Administrator at Oakville Lifecare since November 1991. He testified that Lifecare conducted annual negotiations with the OTMH concerning the per diem rates which the OTMH would pay to Lifecare for the 35 beds which Lifecare provided at its facility to the OTMH for occupancy by long-term care patients of the OTMH. These beds were required apparently as a result of a lack of space and ongoing renovation at the OTMH.

8. Mr. Picott conducted the 1992 per diem rate negotiations with the OTMH. He testified that in 1992 the OTMH itself faced funding restrictions. As a result it was not prepared to pay the per diem rates which Lifecare wanted. For its part Lifecare could not continue to provide the services and staff which the OTMH desired unless the per diem request was granted, or Lifecare's operating costs with respect to the hospital beds were reduced.

9. It was Mr. Picott's evidence that at this time Lifecare had determined that, as a result of Ministry of Health (MOH) changes in funding for its nursing home beds, the facility was actually receiving a greater per diem rate with respect to its nursing home beds than the per diem it was receiving from the OTMH for the 35 beds in the hospital wing. Mr. Picott testified that although it was more expensive to operate the hospital wing, Lifecare was receiving less money to provide care to the residents of this wing than the money received from other sources to provide care to the other residents. Officials at the OTMH were therefore made aware of this funding inequity.

10. It was Mr. Picott's evidence that Lifecare determined the per diem that it would require to "break even". The OTMH was not prepared to pay that rate. The ensuing negotiations between

the OTMH and Lifecare resulted in an increase in the per diem rates. Mr. Picott testified however that as part of those negotiations the OTMH also “directed” Lifecare to “reduce staff and reallocate positions”. It was his evidence that “essentially they [the OTMH] told us we can adjust our staffing to this [level] and they dictated to us what we can do”. Mr. Picott testified “therefore we were forced to make the changes in order to stay within the box they gave us”. This “box” refers to the parameters set as a result of the negotiated per diem rates and the minimum hours of RN, RNA and health care worker care which Lifecare is required to provide to the OTMH patients under the terms of its contract with the OTMH.

11. The thrust of Mr. Picott’s evidence was that in fact there was little “true” negotiation between the OTMH and Lifecare. The OTMH essentially directed Lifecare how it was to staff its hospital wing. In addition, although OTMH was aware Lifecare was operating within the statutory freeze period (having been advised of that fact by Mr. Picott) no accommodation for this fact was made by the OTMH. Implicit in his evidence was the suggestion that the economic circumstances were such that in order for Lifecare to remain financially viable the staffing levels would either have to be revised or the hospital wing would have to be closed. In fact the staffing levels were revised and led to the alteration of hours which forms the basis of the union’s complaint.

12. At this point it is appropriate to note that Lifecare is a “for-profit” facility because this fact is relevant to both the employer’s arguments in respect of economic justification, and its position that the changes were the result of “a business as usual” approach and/or an implementation of a course of conduct initiated and communicated to employees in the bargaining unit before the freeze period.

13. As a “for-profit” operation, Lifecare (as is the case with any other business) must operate within the parameters established by its “income received” and “expenses” or “operating costs” amounts. In this regard Mr. Picott testified that Lifecare’s income comes from three sources - the OTMH (for the hospital wing), the MOH which dictates the per diem rates to be paid by the 178 nursing home bed residents, and the rates paid by the other residents occupying the residential or retirement wing. The maximum per diem rates which Lifecare can charge this latter group however are also legislated by the government.

14. Mr. Picott testified that the “government’s inability to give us proper per diem increases” caused Lifecare to review its staffing with a view to reducing costs in order to stay “financially viable”. In late 1990 and early 1991 a plan involving the restructuring of staffing levels in a manner that would still meet the MOH guidelines was devised by Lifecare. As a result certain positions which had been designated as “RN positions” were now to be designated as “R.N.A. positions”.

15. At the time of this review however there was a market place shortage of qualified R.N.A.’s. As a result the newly designated R.N.A. positions continued to be filled by qualified R.N.’s paid the applicable R.N. rates and the restructuring plan was not in fact implemented.

16. One of the R.N.’s affected by the alteration of hours was Ms. T. Cox. It is Lifecare’s assertion that Ms. Cox’s position was designated as an R.N.A. position in late 1990 prior to the union’s certification. That R.N.A. position falls within the employer’s SEIU bargaining unit. As a result the employer asserts that any alteration of Ms. Cox’s hours does not impact upon the ONA’s bargaining unit and cannot be a violation of section 13 of the HLDAA.

17. Ms. Cox’s testimony confirmed at least a portion of Mr. Picott’s evidence. Ms. Cox testified that at a meeting in December 1990 the employees were advised that there would be staffing changes “effective immediately” and that Lifecare would be changing “as many R.N. positions to

R.N.A. positions as possible". She was subsequently advised however that the changes could not be put into effect because Lifecare "didn't have any present staff to fill the positions". Ms. Cox also testified that she subsequently received a letter from Lifecare to the effect that the employees "were to maintain their present positions until further notice".

18. Thus, although Ms. Cox was aware that her position was not to be designated as a R.N. position any longer, she maintained that the proposed changes were never put into effect as R.N.'s, R.N.A.'s and graduate nurses continued to hold that position until November 1992 when the staffing patterns at the facility were altered with a consequent loss of hours for certain employees.

THE EFFECT OF THE CHANGES

19. In November 1992 as a result of both Lifecare's agreement with the OTMH and the re-designation of certain positions, an R.N.A. commenced to work the night shift at the hospital wing. An R.N. had previously filled that night shift position. The fact that an R.N.A. was now filling that night shift position had what can best be described as a "domino" effect. The R.N. who had worked on that shift was reassigned to another part of the facility referred to as the third floor unit. This transfer did not result in any loss of hours for that R.N. and there is no complaint that this transfer violated the freeze provisions of the HLDAA. We note however that the union characterizes this event as a "contracting out" of the R.N. night shift position. The employer disputes this characterization.

20. As a result of this R.N.'s transfer the hours of work of the R.N.'s on the third floor unit were affected. Two of the employees on whose behalf the ONA has filed this application (Maria Parker and Anne Adair) had been job sharing a full-time R.N. position on this third floor unit such that each worked seven shifts in a two week pay period. With the transfer of the R.N. from the hospital wing to the third floor unit the schedules of these job sharers changed so that each was now scheduled to work only five shifts in a two week period. Moreover not all of these shifts were on the third floor. Some shifts were to be worked on the second floor south west wing (2SW).

21. As a result of this fact the shifts of Ms. Cox, the R.N. on 2SW, were affected. Prior to the staffing changes Ms. Cox had job shared a position on 2SW with the result that she had regularly worked every Tuesday, Wednesday and Thursday night shift. (As noted, the employer claims this position is an R.N.A. position. The trade union disputes this.) When Ms. Adair and Ms. Parker started to work some shifts on 2SW, Ms. Cox's schedule was changed so that she only worked every Wednesday and Thursday night shift.

22. It is these scheduling changes and the consequent loss of hours for some employees about which the ONA complains. As a result it seeks a declaration that the employer has violated section 13 of the HLDAA, compensation for the three nurses who have lost hours of work, and an order directing the employer to restore the work schedules of Mesdames Cox, Adair, and Parker to their pre-November 1992 levels.

23. Lifecare disputes that its actions are a violation of section 13 of the HLDAA. The employer argues that throughout it has conducted itself in a manner consistent with its "business as before" period. It argues that the staffing changes were prompted by the economic situation facing Lifecare, were justified in the circumstances, and were unrelated to the ONA's certification. In addition the employer submits that the staffing changes had been initiated before the union's certification and were merely implemented after the union was certified. Finally, Lifecare asserts that in any event the three employees did not suffer any damages because if they had worked all the shifts which had been offered to them they would not have suffered any reduction in hours. This

latter position goes merely to the matter of the appropriate remedy if a violation is found and will be addressed below.

THE LAW

ANTI-UNION ANIMUS

24. In its complaint the union originally asserted that the employer's conduct violated sections 65, 67 and 71 of the *Labour Relations Act*. These allegations were not pursued at the hearing. There is neither an allegation nor any evidence that any anti-union animus motivated the conduct about which the union complains. The only issue before us revolves around the violation of the statutory freeze.

25. The freeze provisions are strict liability provisions and there need not be any improper motive or anti-union animus underlying the employer's actions in order for the Board to find that the provisions have been violated. (See, *Beaver Electronics Limited*, [1974] OLRB Rep. March 120; *The Wellesley Hospital Hospital*, [1976] OLRB Rep. July 364; *Kodak Canada Limited*, [1977] OLRB Rep. Aug. 517). In this case the trade union acknowledged that anti-union animus did not precipitate the alteration in the hours of work of Mesdames Cox, Adair and Parker. Indeed, the Board would go further and accept that the employer's motivation in altering the work schedules was solely for business reasons.

PURPOSE OF THE STATUTORY FREEZE

26. Section 13 of HLDA provides:

13. Notwithstanding subsection 81(1) of the *Labour Relations Act*, where notice has been given under section 14 or 54 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

27. Section 81, subsection 1 of the *Labour Relations Act* provides:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 54 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 45 applies with necessary modifications thereto.

28. These statutory provisions are commonly referred to as “freeze” provisions because a strict reading and construction of the provisions would indicate that the rates of wages, term or conditions of employment, rights, privileges or duties of the employer, trade union and the employees are “frozen” when, as here, notice to bargain has been given.

29. In fact however the Board has consistently interpreted the freeze provisions in a more purposive manner and has rejected any strict, literal interpretation of the provisions which would result in a static, unchanging employment and business environment. A flexible, more purposive labour relations approach permits the Board to be more responsive to the circumstances, concerns and interests of the litigants appearing before it. For that reason the Board has developed tests such as “business as usual” and the “reasonable expectations of the employees”. In applying any of these tests the Board must carefully balance what are inevitably the competing interests, rights and obligations of the parties as their relationship moves through the collective bargaining process which follows the certification of the union and the giving of notice to bargain. As noted in *Sunnycrest Nursing Home Limited*, [1982] OLRB Rep. Feb. 261 at paragraph 44:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

30. The purpose of the statutory freeze provisions was described in *AES Data Limited*, [1979] OLRB Rep. May 368 at paragraph 10 as follows:

10. The purpose of section 70 [now section 81] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the *status quo* which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The *status quo* includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be “privileges.” It is clear that express promises, or a consistent pattern of employer conduct can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the “rights and privileges” of the employer. The section requires both parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

The “business as before” approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

[emphasis in original]

31. That concept of “business as before” was expanded on in *Simpsons Limited*, [1985] OLRB Rep. Apr. 594 (Tacon panel) where the Board stated:

23. That section 79 [now section 81] is intended to maintain the status quo, to provide a period of stability while the parties are establishing their collective bargaining relationship or renewing that relationship by negotiating another collective agreement, is a sentiment often affirmed by the Board. The classic exposition of the parameters imposed on employer conduct during the freeze is the business as before formula in *Spar Aerospace*, *supra*. That formula has been referred to in virtually every case which since has considered section 79. The cases also confirm that section 79 is a strict liability provision in that anti-union animus is not a relevant factor.

24. The interpretation of section 79 in the context of particular fact situations, however, has seldom proved simple or straightforward. ...

25. And, as stated in *Grey Owen Sound*, *supra*, at paragraph 22:

The Board, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, articulated a business as before rule during the freeze period. In essence, the Board decided that the legislative intent of the freeze was to maintain the prior pattern of the employment relationship in its entirety. (See paragraph 19 of the decision). One problem in a first agreement situation is that the parties are in transition from a situation of unrestricted management’s rights to one in which collective bargaining will result in some shift in the balance of power as between employer and employees. It is often very difficult in such situations to ascertain what the pattern of the employment relationship was.

26. Section 79(2) freezes the wage rates, other terms and conditions of employment, rights, duties and privileges of the employees and the rights, privileges and duties of employers for the period specified. Most of the freeze cases have arisen in the context described by the above quotation from *Grey Owen Sound*, that is, the transition from unrestricted management rights to a collective bargaining regime wherein those management rights are limited to a greater or lesser extent. In this context, the cases have discussed on the rights of employers versus the privileges of the employees. In other words, the statute freezes employees’ privileges and it is the scope given to the employees’ privileges which circumscribes the otherwise unlimited reach of employer rights.

27. Before the transition to a collective bargaining relationship, then, the doctrine of management rights is so broad, so all-embracing that there need be no recourse to employer privileges in the context of section 79(2). Once the transition is complete, however, and the freeze arises when the parties are bargaining for a renewal agreement, there may well be found employer privileges. In *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, for example, the Board held that a union had waived certain rights under its collective agreement and could not adopt a different posture during the freeze.

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that

approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace*, *supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. Business as before is a slippery concept to apply to specific fact situations. The focus of the test is the pattern of operations, the employer's practice. Certainly, where the practice is accurately embodied in an employer's policy manual, the application of business as before has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spar Aerospace*, *supra*, with respect to annual merit and annual cost of living increases. On the other hand, the increased parking fee cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, September 1984, unreported, File No. 0965-84-U(B). Does business as before require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the actual rate at the time of the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a pattern or business as before to measure employees' privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons*, *supra*; *Burlington Carpet Mills*, *supra*; *The Winchester Press*, *supra*; *Grey Owen Sound*, *supra*; *Deacon Brothers*, *supra*; *Airline (Malton) Credit Union*, *supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound*, *supra*; *The Winchester Press*, *supra*; and where the layoffs had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpsons*, *supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia*, *supra*, for the proposition that the employer may also contract out work for the first time during the freeze.

31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focusing on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one; what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244. The Board considers that the upholding of the right to contract out during the freeze period in *Corporation of the Town of Petrolia, supra*, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see par. 20, in particular).

35. Finally, the lay-off cases are consonant with the reasonable expectations approach. Very few, if any, work forces are entirely static; fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze. The magnitude of the layoffs, of course, must be proportional or relative to the severity of the economic circumstances. Economic justification must be proven where relied on and there must be an absence of anti-union animus. ...

32. Both the “business as usual” and “reasonable expectations” tests may at times be difficult to apply. The tests however enable the Board to properly consider and balance the rights and privileges of the employer as circumscribed by the rights and privileges of the employees and their bargaining agent. Thus in this case there is no doubt that the events and circumstances of November and December 1992 “changed” the business and employment environment at Lifecare. The issue however is whether this “change” was merely business as usual (justified by the economic circumstances facing the employer), and whether the change was consistent with the reasonable expectations of the employees concerning their continued terms or conditions of employment, privileges or duties during the freeze period. What then is the result if we apply these tests to the facts and circumstances before us?

BUSINESS AS USUAL AND ECONOMIC JUSTIFICATION

33. Throughout the presentation of its case the employer’s representative argued that Lifecare was merely conducting its business “as before” or “as usual”. Reference to this concept was made in both the opening statements and in final argument.

34. There was however no evidence presented before this Board to support that assertion. We heard no evidence about whether or under what circumstances Lifecare had made previous alterations to its staffing levels, the hours of work of its employees, the work schedules of its employees etc. Thus we have no evidence upon which we can make any determination as to whether the employer’s actions and conduct were in fact the “usual” way in which it did or would respond to the circumstances which Lifecare faced in the fall of 1992. The employer’s only witness became the administrator of this facility in November 1991, while the freeze was in effect, and

after the trade union had been certified. He did not or could not testify as to how the employer conducted its operations in Oakville prior to that time.

35. We have no evidence about Lifecare's practices before the freeze period with respect to either changes in staffing, reductions in hours of work or changes to the work schedules of staff. There is no evidence before us as to how Lifecare managed its operations before the onset of the freeze. Under these circumstances we reject the employer's position that Lifecare's staffing changes, the changes to the schedules, and the reduction of hours of work for some employees were merely the exercise of managements rights in a manner "as usual" or "as before". We do not accept that the changes which took place were consistent with Lifecare's managerial practices before the onset of the freeze.

36. Lifecare also submitted that there was economic justification for its actions. It asserted that the economic conditions facing it were such that the changes to staffing and the schedules of hours had to be made if Lifecare was to continue to be a financially viable operation. In addition the employer argued that the changes were directly related to third party funding and as such were beyond the control of Lifecare.

37. We accept that employers can and must be able to respond to changes in economic conditions during a freeze period subject to the caveat that its response must be "as before". At times that response may lead to a "first time event" as referred to in *Simpsons Limited, supra*. We also agree that it is reasonable for employees and trade unions alike to expect that an employer faced with significant economic difficulties will respond appropriately to ensure its continued financial viability. In this regard an employer's response may very well include a reduction in hours or changes to work schedules. The rights and privileges of the employees and the trade union which are "frozen" when notice to bargain is given cannot be interpreted so expansively as to eliminate the employer's rights to effectively manage its operations in the face of changing economic circumstances (see, *Simpsons Limited*, (Tacon panel), *supra*).

38. There is however little concrete evidence before the Board to substantiate the employer's economic justification arguments. Rather the evidence points to a finding that what Lifecare did during the freeze and without the union's consent was to introduce a new means of operations to reduce costs.

39. Lifecare linked the staffing and scheduling changes to the OTMH funding of the hospital wing. The evidence discloses however that the *per diem* rates paid by the OTMH were actually increased during the freeze period as a result of Mr. Picott's negotiations. There was thus no decrease in funding to justify staffing changes. There is also no evidence of any downturn in the "business" of Lifecare such as a decrease in the number of residents in the hospital wing. In any event the total amount of money received from the OTMH is not dependent on the actual occupancy rate in the hospital wing and does not vary with the actual number of patients in the wing. There is no evidence that the number of nursing home residents or retirement wing residents decreased and prompted staffing changes. Nor is there any evidence or suggestion that the staffing reorganization and the alterations to the work schedules of the employees was the result of a change in job functions. Rather these changes were the result of the decision to assign those job functions to a different group of employees.

40. In this case the staffing changes and the consequent alteration to the employees' schedules and loss of hours of work for some employees was not simply an adjustment in the number of staff required to carry out the employer's operation. Rather the changes arose because of Lifecare's decision to carry on its business in a different manner than before. Whereas before Lifecare had staffed the hospital wing night shift with a qualified R. N., the employer elected during the

freeze, and without the consent of the union, to staff that shift with an R.N.A. The same work continued to be performed for the same residents, and for the benefit of the employer's operations, but with different employees. The elimination of the night shift R.N. position was not the result of an economic downturn or a lack of demand for the work performed. It was the result of the employer's decision to change its operations and reduce its operating costs by having the available work performed by its other employees.

41. Lifecare has not satisfied the evidentiary burden placed upon it if it wishes to avail itself of an economic justification argument. Lifecare presented no evidence about its actual expenses and operating costs, revenues received, profit or loss position, to provide some context within which its economic justification assertions can be measured and assessed. Neither did it present any evidence about what Mr. Picott characterized as the per diem it required to "break even". The evidence we *do* have is both that the OTMH rates were increased, and that the work continued to be performed by other employees.

42. The entirety of the evidence indicates that Lifecare determined that in order to maintain what it viewed as a "financially viable" position it would have to somehow reduce operating expenses. Staffing changes and a reduction of hours for some employees was the means Lifecare chose to attain that goal. In substance however that conduct is not much different than other conduct proscribed by the statutory freeze such as the unilateral reduction of the hourly rates of employees during the freeze by an employer who determined a need to reduce operating costs.

43. In balancing the interests of the parties in the circumstances of this case, and given the insufficiency of the evidence as it relates to economic justification, we are of the view that it is not unduly onerous to require this employer to wait either until the expiration of the freeze period or until it obtains the consent of the trade union before it makes fundamental changes to its staffing levels and employee work schedules in an effort to reduce costs. Experience has shown that the process of collective agreement negotiations and interest arbitration set out in the HLDAA is inevitably a long slow process which often takes in excess of two years to conclude. That is certainly true of the circumstances before us where more than two years elapsed between the giving of notice to bargain and the settlement of the collective agreement terms. Given such a lengthy period of time during which the freeze is in effect it is particularly important that the trade union and the employer work together to resolve issues such as these. With the consent of the trade union during bargaining, or as a result of agreed upon collective agreement terms, Lifecare may well be able to make the staffing and scheduling changes which it maintains are necessary in order for it to continue to be financially viable. To unilaterally do so during the freeze period and without the consent of the trade union however violates section 13 of the HLDAA.

IMPLEMENTATION OF CHANGES DETERMINED AND ANNOUNCED PRIOR TO THE FREEZE

44. The decisions of the Board affirm the right of an employer to implement changes notwithstanding the statutory freeze provisions if the changes were initiated or adopted prior to the freeze. The changes must have also have been communicated to the employees before the onset of the freeze. (See for example, *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244, *Carleton University*, [1978] OLRB Rep. Feb. 184, *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461).

45. We agree with that approach. Contrary to the assertions of the employer however we find that such an approach has no application to the case before us. In our view the intervening events and the length of time which elapsed between the time the changes were decided upon and announced and the time when the changes actually occurred are significant factors which detract

from the employer's position that it was merely carrying through with changes initiated and communicated prior to the union's certification.

46. Lifecare did communicate planned staffing changes to the employees sometime in December 1990 prior to the union's certification. The evidence indicates however that those changes were not implemented. Although Lifecare intended and announced that it would change the designation of certain R.N. positions to R.N.A. positions, a shortage of qualified available R.N.A.'s prevented it from going ahead with that plan. Ms. Cox's evidence indicates that employees were advised shortly after the planned staff restructuring was announced that the *status quo* would be maintained until further notice. As a result R.N.'s continued to fill "designated" R.N.A. positions and continued to be paid applicable R.N. rates until the changes which gave rise to this complaint were made in December 1992. In addition the evidence indicates that the December 1992 changes were made primarily as a result of the negotiations with the OTMH and were not merely the implementation for the predetermined December 1990 plan. In these circumstances we do not accept that the changes which occurred nearly two years after the staff restructuring plans were first announced fall within the scope or intent of the Board's jurisprudence as it relates to the implementation of decisions made prior to the onset of the freeze.

47. If there had been some suggestion that some or part of the staff restructuring plans had actually been implemented within that two year period the Board may not have viewed the two year hiatus as so significant. Certainly we do not mean to suggest that changes initiated and announced to employees prior to the freeze must be immediately acted upon. The circumstances may be such that immediate action or implementation is impossible or inappropriate. Similarly if there had been evidence that after the onset of the freeze Lifecare re-iterated its position that it continued to intend to effect the previously announced changes but was unable to do so because of a shortage of RNA's we might have viewed the matter differently. Where as here however nothing was done to re-affirm the planned changes and nothing was done in reliance of the restructuring plans for nearly two years, it is neither "business as usual" nor within the "reasonable expectations" of the employees and the trade union to implement the changes during the freeze, when the parties are bargaining for a collective agreement, and without notice to the union.

REASONABLE EXPECTATIONS OF THE EMPLOYEES

48. There was some suggestion in the employer's position and particularly in its cross-examination of Ms. Cox that the employees could not expect to continue to enjoy their very favourable job sharing arrangements *ad infinitum*. Although not specifically articulated in its final submissions, it appeared to be Lifecare's position that the job sharers directly affected by the changes to staffing and scheduling did not and could not have any reasonable expectation that their work schedules and hours of work would remain static. It could therefore not be a violation of the statutory freeze provisions to alter those work schedules. For its part, the trade union specifically took the position that it was within the reasonable expectation of the employees that their work schedules, notwithstanding their uniqueness, would not be unilaterally altered by the employer during the freeze. For these reasons we find it appropriate to address the "reasonable expectation of employees" issues notwithstanding the fact that we have up to this point dealt with this application of the basis of the "business as before" test.

49. The statutory provisions and the Board's jurisprudence refer to terms or conditions of employment and the rights and "privileges" of the employees. A privilege is essentially a benefit received by employees to which they have no legal claim. In *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 the Board stated at paragraph 10:

"Section 70(2) [now section 80(2)] preserves not only the employees' terms

and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term 'privilege' is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a 'right.' In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board's consideration must be beyond the strictly legal incidents of the relationship ('rights') and include those aspects of the relationship which give rise to 'privileges.'"

50. This case involves a "privilege" of the employees. In the circumstances before us, the employees may not have had a legal right to insist on working only specific shifts (i.e. Ms. Cox's only Tuesday, Wednesday, Thursday nights shifts schedule). Their unique job sharing arrangements and schedules however were in our view a "privilege" or a benefit within the meaning of the HLDAA. A "privilege" may be personal to a particular employee. Thus, the Board has found that the discharge of an employee who refused to work on Saturdays violates the statutory freeze where the employee had enjoyed "a personal privilege absolving her from the normal requirement to work Saturday shifts". (See, *Cloverleaf Hotel*, [1981] OLRB Rep. June 630).

51. In the instant case we find that the employer's past conduct with respect to the work schedules of the individual job sharing employees named in the complaint gave rise to a reasonable expectation on the part of those employees that their existing scheduling "privileges" or "benefits" would continue during the freeze. Their job sharing arrangements had been continued for some time notwithstanding the employer's intended staff restructuring plans. There was no reduction in the amount of available work. In addition, the employees could reasonably expect that this privilege would not be unilaterally altered without notice to, or the consent of, their newly certified bargaining agent while the employer and the trade union were negotiating a collective agreement. The reasonable expectation of the employees would be that as staffing, hours of work, work schedules etc. are fundamental issues for bargaining these matters would be discussed with their bargaining agent and would not be unilaterally altered.

52. For all of these reasons we have determined that Lifecare violated section 13 of the HLDAA when it altered the hours or work of Mesdames Cox, Adair and Parker.

THE REMEDY

53. This brings us then to the issue of the appropriate remedy. In this regard it is important to emphasize that approximately two weeks before this matter was heard by the Board the parties had completed their collective bargaining negotiations and had concluded a collective agreement subject only to ratification. Indeed their collective agreement was settled without recourse to interest arbitration on the morning of the scheduled interest arbitration hearing.

54. The successful completion of the collective bargaining process and the existence of the collective agreement is a significant factor in determining the appropriate remedy in this instance.

55. Once again we look to the purpose of the freeze provisions. The freeze provisions are a legislative mechanism which provides a fixed and stable point of departure for collective bargaining. Providing such a fixed point facilitates the collective bargaining process. It also ensures that neither party gains an unfair advantage in collective bargaining. Finally, the freeze also prevents

either party from resorting to alterations in their collective bargaining relationship which may violate the spirit and intent of a legislative scheme which seeks to promote a period of some stabilization and tranquillity during which the parties can negotiate without recourse to economic sanctions or, in this instance, interest arbitration. Until sections 13 of the HLDA and section 81 of the OLRA are exhausted therefore neither party should be able to unilaterally alter the collective bargaining relationship. Thus, in *Kodak Canada, supra* the Board referred to these provisions stating that “all legal incidents of the collective bargaining relationship are maintained” [emphasis added]. In *Simpsons, supra*, the Board also referred to the collective bargaining relationship and commented that the freeze defines the parameters within which the transition from unfettered management rights to co-operative collective bargaining occurs. (See also *AES Data Limited, supra Simpson Limited*, [1985] OLRB Rep. March 469, (Springate panel), *Arrow Games Inc.*, [1991] OLRB Rep. Feb. 157, *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554, *Spar Aerospace Products Limited, supra*, *Molsons Brewery Limited*, [1977] OLRB Rep. Aug. 526, *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. July 1147 and the cases cited therein.)

56. To this we would add that the requirement that an employer obtain the consent of the trade union before altering the rates of wages or any other term or condition of employment compels the employer to recognize the authority of the trade union to bargain on behalf of the employees. It necessitates communication between the parties and in that way encourages the joint resolution of issues facing both parties. In our view it is not a coincidence that the statutorily imposed duty to bargain in good faith and the freeze provisions are both triggered by the notice to bargain and generally both terminate upon the conclusion of the collective agreement. As a matter of sound labour relations policy that communicative purpose should also be considered when remedies for a breach of the freeze provisions are considered.

DECLARATORY RELIEF

57. With these purposes in mind an appropriate remedy can be fashioned. The trade union seeks a declaration that the employer has violated the HLDA freeze provisions. We agree that such declaratory relief is appropriate. Certainly, matters such as scheduling, hours of work, job sharing opportunities, contracting out etc. are fundamental issues for bargaining. The employer's actions in this instance were undertaken without prior consent, communication or discussion with the trade union. Yet these actions would necessarily affect the collective bargaining relationship between the parties. The conduct did *not* maintain the “legal incidents of the collective bargaining relationship”. Rather it altered the status quo or the fixed point of departure with respect to issues that go to the heart of collective agreement negotiations. Lifecare's failure to discuss the alterations and staffing level changes with the union before implementation was contrary to the communicative purposes implicit in the freeze provisions. In the result the statutory provisions and the intent and purposes which underlie them was breached. Accordingly, we declare that Lifecare has violated section 13 of the HLDA.

RESTORATION OF THE SCHEDULES

58. The trade union's request that the pre-November 1992 work schedules of Mesdames Cox, Adair and Parker be restored however is much more problematic given the fact that the parties have successfully concluded their collective bargaining and have negotiated a collective agreement. That collective agreement deals with the very matters such as scheduling, hours of work, contracting out, shift changes etc. raised in this complaint.

59. As the parties have been able to successfully negotiate their collective agreement any disruption to the collective bargaining relationship which was or could have been caused by the unilateral actions of the employer has been remedied. The successful completion of the collective

bargaining process also tends to indicate that the communicative purpose underlying the freeze provisions has been met and that the parties have indeed discussed the many issues facing each of them which may now require joint rather than unilateral resolution. There is no evidence that the trade union was disadvantaged in bargaining as a result of the employer's violation of the freeze. Moreover, with the conclusion of the collective agreement the parties have themselves established and defined the terms and conditions of employment and the rights, privileges or duties of the employer, the trade union and the employees in their ongoing relationship. Through the provision of the grievance and arbitration procedure they have also established a mechanism by which issues and disputes with respect to those matters are to be resolved.

60. In the absence of any evidence that the union was disadvantaged or prejudiced in its bargaining as a result of the freeze violation, we do not consider it appropriate to order the employer to restore the schedules of Mesdames Cox, Adair and Parker to their pre-November 1992 levels. In the circumstances any restoration of their schedules would in any event at best be a "nominal" restoration as the various rights of the employer, trade union and the employees with respect to the hours of work of these employees is a matter now governed by the collective agreement. Any continuing issues or disputes with respect to their scheduling is now also governed by the collective agreement.

COMPENSATORY RELIEF

61. Finally, we turn to the matter of compensatory damages for the three individual employees directly affected by the employer's breach of the statutory freeze.

62. The declaratory relief which we have already made is an insufficient remedy for the damages suffered by the employees. In addition, although the individual rights of the employees can *now* be found in the language of the collective agreement, until that collective agreement was negotiated these employees had no opportunity to grieve and arbitrate the issues surrounding the employer's unilateral alteration of their hours of work. In this regard their "loss" is personal and direct and the various policy considerations which caused us not to order a restoration of the work schedules as requested by the trade union do not apply.

63. Lifecare asserts that none of the employees suffered any damage because each was given the opportunity to work additional hours but refused. Lifecare submits that if the employees had not refused the extra shifts offered to them, over a period of time they would have worked an amount of hours roughly equivalent to the hours worked before the changes were made to their work schedules. Lifecare tendered certain documents and calculations which it had made to support this assertion.

64. The documentation relied upon by Lifecare to make the comparison however is inaccurate and incomplete. In his cross-examination Mr. Picott himself admitted to a number of errors and inconsistencies. In addition, the calculations are based on the comparison of the 27 week period which preceded November 9th with the 27 week period which followed that date. No reasonable explanation was given however for choosing the November 9th date when the actual implementation of the changed schedules did not occur until at least November 30th. The November 9th date is arbitrary and yet materially affects the total hours comparison which the employer urges upon us. The 27 week period preceding November 9th was a period during which each of these three employees took some vacation time, yet no allowance is made for that fact in the comparison which the employer desires us to make. Finally, the employer characterizes certain shifts as "refused" by the employees. The evidence however does not support that. On particular days the schedules may indicate the employees who are "not available". There is no evidence however about who made such a notation, when it was made or why it was made. As Mr. Picott admitted

there is nothing to indicate that these employees were ever called or otherwise offered shifts which they then refused. Ms. Cox's and Ms. Adair's evidence is to the contrary.

65. For all of these reasons we do not accept the employer's submissions that the employees did not suffer any loss. We do accept the suggestion that compensation should not be based solely on the fact that the employees did not work particular shifts. In this case compensatory relief is not to be a windfall but rather to compensate for lost opportunities. Thus the fact that hours were worked on a different day or on a different shift must be considered in any award of damages.

66. We have therefore determined that Mesdames Cox, Parker and Adair are to be compensated according to the following formula: from November 30, 1992 to the day of the signing of the collective agreement, for any pay period in which these employees worked less than the total number of hours that they normally would have worked in a pay period prior to November 30, 1992 they are to receive compensation based on the difference between the total number of hours actually worked and the total number of hours they normally would have worked prior to November 30, 1992. To assist the parties in making their calculations we note that the evidence indicates that prior to November 30, 1992 Ms. Cox normally would have worked 45 hours per pay period while Ms. Adair and Ms. Parker normally worked 52.5 hours in a pay period.

67. We note however that in her evidence Ms. Cox admitted that for the Christmas period in 1992 she was unavailable to work Wednesday, December 23 and Thursday, December 24 (days which she would normally have worked before the alteration of the schedules). Ms. Cox's loss for that pay period must take that fact into account.

68. We will remain seized in the event the parties are unable to agree upon the amount of damages owing to these individual employees.

3998-91-R Ontario Nurses' Association, Applicant v. Pembroke Civic Hospital, Responding Party.

Bargaining Unit - Certification - Whether description of nurses' bargaining unit ought to include phrase "in a nursing capacity" - Whether certain disputed positions should be included in bargaining unit - Board seeing no good reason why traditional description of nurses' bargaining unit should be amended and finding, therefore, that description ought to include phrase "employed in nursing capacity" - Board finding Nurse Clinician, Pharmacy Technician and Discharge Planner positions in the bargaining unit

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *E. McIntyre*, *Mary Hodder*, *Sharon Foulds* and *Jeff Andrew* for the applicant; *Carole Piette*, *Bill Cowan* and *Lois Moss* for the responding party.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; October 19, 1993

1. This is an application for certification in which the Board by decision dated April 6,

1992, issued an interim certificate. The matter was adjourned *sine die* at the time, and on request of the applicant, has been re-listed for hearing.

2. The interim certificate granted the applicant bargaining rights on behalf of all registered and graduate nurses "employed in a nursing capacity" excluding, among others, the Nurse Clinician, Pharmacy Technicians, Discharge Planner and Occupational Health/Infection Control Coordinator. The term "employed in a nursing capacity" is in dispute for the purposes of the final certificate, as is the exclusion or inclusion of the above positions. At the hearing before us, the parties informed the Board that the position of Occupational Health/Infection Control Coordinator is no longer in dispute. The Discharge Planner is now called Discharge Planner/Infection Control Nurse.

3. It is the position of the applicant (referred to herein for ease of reference as "ONA") that the description of the bargaining unit ought not to include the limiting phrase "in a nursing capacity". Whether or not that position is accepted by the Board, ONA also asserts that the positions of Nurse Clinician, Pharmacy Technician and Discharge Planner/Infection Control Nurse (hereafter referred to as simply "Discharge Planner") ought to be included in the unit. The employer (referred to herein as "the hospital" or "Pembroke Hospital") wishes the bargaining unit to be confined to those registered and graduate nurses employed in a nursing capacity. Further, it asserts that the positions in dispute are not employed in a nursing capacity and do not share a community of interest with the rest of the bargaining unit. The employer takes the position as well that the Nurse Clinician is excluded from the Act under section 1(3), as a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

4. The Board heard the evidence of Eleanor Wright, Geraldine St. Louis and Evie Cain, who are incumbents in the positions in dispute, as well as from Judy Peterson for ONA and Lorraine Weber and Lois Moss for the hospital. We have made findings of fact based on their evidence as well as on the documentary materials provided by the parties, which we have reviewed thoroughly, and have drawn inferences where necessary based on the above. We make one brief comment with respect to the evidence of Judy Peterson. Although Ms. Peterson's extensive background in nursing and nursing education amply qualifies her as an expert witness, we are unable, in assessing her evidence, to ignore the fact that she is an employee of ONA. We do not intend this comment to suggest that this played a large part in our determinations, for there was much in her evidence that was helpful and much that is not contentious. We merely state that in considering Ms. Peterson's opinions on the issues before us, we bear this in mind.

5. The evidence was, for the most part, thorough in its canvassing of the issues, credible and helpful. The parties also provided thoughtful and detailed statements of facts in accordance with the Board's prior direction and were efficient and cooperative in the presentation of their cases, all of which greatly assisted the Board in the hearing of this matter. Both the evidence and submissions have been necessarily abbreviated in the recounting below.

I

6. Pembroke Civic Hospital is a ninety bed acute care hospital with approximately 350 employees. Apart from the bargaining unit represented by ONA, the only other unionized group at the hospital are the Registered Nursing Assistants, who are represented by the Practical Nurses Federation of Ontario. In general, the structure of the hospital is as follows. There is an Executive Director, who has two Assistant Executive Directors ("AED") reporting to him. One is the Assistant Executive Director Hospital Services and the other is the Assistant Executive Director Patient Services, Lois Moss. Included in the responsibilities of the AED Patient Services are the areas of Nursing, Pharmacy, Respiratory, Physiotherapy and the positions of Nurse Clinician and Discharge Planner. In the area of Nursing, the staff nurses, among others, report to Nurse Managers,

who have been excluded by agreement from this bargaining unit as falling within 1(3) of the Act. The Nurse Managers in turn report to Ms. Moss. The Nurse Clinician and the Discharge Planner report directly to Ms. Moss.

Nurse Clinician

7. Eleanor Wright presently holds the position of Nurse Clinician at the hospital. She also performs the functions of Occupational Health Nurse. Ms. Wright is a Registered Nurse holding a certificate of competence from the Ontario College of Nurses. She has been an RN since 1975. She started working at Pembroke Civic Hospital in 1976, as a staff nurse on a medical floor. From 1980 to 1992, she worked as a staff nurse and then Critical Care Coordinator in the Intensive Care Unit at the hospital. In March of 1992, she took the position of Nurse Clinician, as a result of downsizing in the hospital.

8. Essentially, the role of the Nurse Clinician is the education of staff nurses and RNA's within the hospital setting. The nature of this job and major responsibilities are usefully summarized in the Position Profile, which is consistent with the oral evidence of Ms. Wright:

NATURE AND SCOPE OF RESPONSIBILITIES

- The Nurse Clinician functions as an integral part of the Nursing Department. With responsibilities for assisting staff nurses in the assessment, planning implementation and evaluation of patient care and nursing practice activities, the nurse clinician works within the philosophy of nursing to foster, facilitate and achieve the highest standards of care in accordance with the Pembroke Civic Hospital's Mission Statement.
- The role is defined by the needs of the hospital, a select/patient/family population, and the goals for professional nursing practice.

MAJOR RESPONSIBILITIES

- Instruct and supervise nursing staff in delegated medical acts and added nursing skills.
- Function as a resource person to nursing staff in areas of patient care.
- Assist in the revising of nursing policies and procedures.
- Act as resource person to various Hospital Committees - Pharmacy & Therapeutics, Nursing Practice.
- Maintenance of hospital's crash carts. Monitor Red Alert Drills.
- Identify learning needs of nursing staff through independent assessment and collaboration with Nurse Managers.
- Collaborate with health care professionals within the hospital and in other health care agencies and institutions in educational endeavours related to patient care and professional development.
- Communicate with Nurse Managers regarding nursing staffs' competencies.
- Facilitate problem-solving with nursing staff regarding clinical practice and/or patient care issues.

9. Much of the teaching for which Ms. Wright is responsible is in the category of "added nursing skills". These are defined in the College of Nurses "Guidelines for Decision making" as "acts in the practice of nursing for which the basic nursing programs provide neither specific theory

nor clinical practice. These skills are not taught in basic programs, either because they are not needed by many clients or because they are required only in specialty areas of practice." Examples of added nursing skills which are taught by Ms. Wright include intravenous therapy, blood therapy, and accessing the central venous line.

10. Each unit of the hospital has specific added nursing skills which its staff nurses are expected to be able to perform. Ms. Wright researches the skill required, develops a policy to explain the procedure, then teaches the skill, usually through demonstration. When a nurse shows that she or he is competent to do the procedure, Ms. Wright certifies that person for the particular skill.

11. Ms. Wright is also involved in the education of staff nurses for "sanctioned medical acts". These are medical acts which can be delegated by physicians to nurses and include, for example, defibrillation. Ms. Wright instructs the nurses on these procedures, under the supervision of a physician, who then certifies the competence of the nurse to perform the procedure.

12. As shown in the Position Profile, part of Ms. Wright's position involves functioning as a resource person to nursing staff in areas of patient care. Ms. Wright has regular contact with staff nurses in this troubleshooting role. Because of her knowledge, she is available to the nurses for assistance in solving patient care problems. Ms. Wright routinely visits the various units. She does not have a great deal of direct patient contact, but may do so in her troubleshooting role and also in clinical demonstrations.

13. The Position Profile states, among other things, that a requirement of the job is registration with the College of Nurses. As well, the hospital requires "demonstrated skills in the areas of communication, clinical practice and teaching" and "five years of acute care nursing experience." Ms. Wright states that it is very necessary to her job that she keep her own nursing and clinical skills current.

14. Where a nurse fails to pass a test for required skills on a nursing unit, Ms. Wright may work with the Nurse Manager to identify what can be done to help the nurse obtain more knowledge and skills in order to perform the procedure. She does not make decisions to impose disciplinary action. Ms. Wright may also be asked by Nurse Managers engaged in performance appraisals of the nurses if she has any concerns with respect to their competence.

15. At the present time (it was agreed by the parties that the Board could look at the positions as they currently exist), Ms. Wright also fulfills the functions of Occupational Health Nurse. She spends about one hour per week in this role. In this role, she essentially acts as a health advisor to hospital staff. She conducts tuberculous skin tests, immunizations if required, and other employee health assessments. The information she gathers on an employee's health is contained in confidential employee health records, which Ms. Wright states are not shared with management. Part of her role is health promotion and health teaching with respect to employees of the hospital.

16. Ms. Moss testified that Nurse Managers might require information from the Occupational Health Nurse on use of sick time by nurses, although the evidence is that such a request has never been made.

Pharmacy Technician

17. Geraldine St. Louis is one of three persons holding the position of Pharmacy Technician (which is now called Pharmacy Technician I). At present, one of these persons is on maternity leave. All of these persons work part-time. In the pharmacy, there is also a Pharmacist, Lorraine

Weber, and a Pharmacy Technician II (which until November of 1992 was called the Pharmacy Clerk).

18. Prior to 1984, there were no Pharmacy Technicians employed at the hospital. The hospital had a Pharmacist, and a Pharmacy Clerk. In 1984, the three positions of Pharmacy Technician were created. The creation of these positions was related to a change within the hospital in the manner in which medications were dispensed. Prior to 1984, all of the nursing units had their own large stock of medications on the unit. Each staff nurse took medication as required from this stock. As of 1984, the function of dispensing medications from a large stock is now performed within the pharmacy, although the units still have a small "ward stock" of basic medications such as pain relievers. Nurses in the units are still involved in dispensing medication from the ward stocks.

19. Ms. St. Louis has been a Registered Nurse since 1973. She worked as a part-time staff nurse at Pembroke from 1977 to 1984, when she took on the position in the pharmacy. All three incumbents in this position are RN's, who came from within the hospital. At the time of their hiring and continuing until November of 1992, the hospital required a certificate of competence as an RN for the position. The current incumbents are the same persons hired in 1984 when the position was originally created. No additional courses or outside training was required of the incumbents. There was on-the-job training which involved about 8-10 days of instruction from and working under the direct supervision of the Pharmacist.

20. All of the incumbents in the position have also worked as staff nurses on a casual basis. At present, two of the incumbents still work the occasional shift as a staff nurse at the hospital.

21. The main responsibility of the Pharmacy Technicians I is the dispensing of medication orders in accordance with doctor's orders. The Position Profile in effect as of the certification application date states:

NATURE AND SCOPE OF RESPONSIBILITIES

- Under the supervision of the Director Pharmacy, the Pharmacy Technician assists in maintaining the drug distribution system and in the planning, organizing and supervising activities in hospital pharmacy according to hospital policies, standards of practice of the department and federal and provincial laws.

MAJOR RESPONSIBILITIES

- Dispenses medication orders for delivery to nursing units.
- Restocks medication carts on each unit on a weekly basis.
- Reconstitutes Pentothal and Brietal for O.R. and chemotherapy drugs in accordance with health and safety guidelines.
- Fills orders for narcotic and controlled drugs and maintains accurate records for perpetual inventory.
- Maintains patient medication profiles.
- Assists physicians and nurses with drug information in absence of Pharmacist.
- Prepackages medication for ward stock and completes appropriate documentation.

KNOWLEDGE AND SKILLS

- Current Certificate of Competence as a Registered Nurse in Ontario.
- Knowledge of drugs and dosage guidelines essential.
- Ability to communicate with all hospital personnel.
- Ability to make decisions independently in absence of Pharmacist.

22. Pharmacy Technicians I do not generally have any contact with patients, nor are they familiar with the medical histories of the patients beyond the diagnosis which is indicated on every order. As stated on the Position Profile, they are expected to have knowledge of drugs and dosage guidelines, and the indications and contraindications of common medications.

23. At night, when there is no one in the pharmacy, staff nurses who require medication have access to a cupboard in the pharmacy which contains a stock of most medication. Access to the cupboard is controlled and monitored electronically.

24. The evidence shows that the Pharmacist also engages in the dispensing of medication, although she clearly has more duties and responsibilities than the Pharmacy Technicians I. The Pharmacist is not a Registered Nurse.

25. The Pharmacy Technician II, on occasion, assists in dispensing medication by filling orders which are then checked by the Pharmacist or a Pharmacy Technician I. This is a small portion of her job, which consists of various duties around the pharmacy relating to dispensing, purchasing, receiving, clerical and portering tasks. In all, about 85% of this position relates to clerical, administrative and delivery tasks. In contrast to the Pharmacy Technicians I, the Pharmacy Technician II is not required to have knowledge of drugs and dosage guidelines, nor is required to make decisions independently in the absence of the Pharmacist.

26. The Pharmacy Technician II holds a certificate as a Registered Nursing Assistant which, however, is not a requirement of this position. This position is not included in the RNA bargaining unit, apparently by agreement of the parties. Also not included in the RNA bargaining unit are persons working at the hospital as ward clerks and laboratory assistants holding an RNA certificate.

27. In the hospital's evidence, registration with the College of Nurses was until very recently a requirement for the job of Pharmacy Technician I because the hospital always has staff nurses looking for part-time work. The hospital prefers to hire from within, and views the knowledge and experience of the staff nurses as a good basis for working in the pharmacy.

28. The evidence is that in November of 1992 (eight months after the certification application date), the Position Profile for the job of Pharmacy Technician I was changed. Instead of requiring a certificate of competence as a Registered Nurse in Ontario, the Profile now states: "Current Certificate of Competence as a Registered Nurse in Ontario or equivalent experience".

29. It was explained that the change to the qualifications required for this position came about as a result of the maternity leave taken by one of the RN's holding the position of Pharmacy Technician I. The hospital put out an internal job posting, looking for a Registered Nurse to fill the maternity leave vacancy. However, it was unable to find a Registered Nurse, and the hospital advertised the job, adding the phrase "or equivalent experience". The person hired for the maternity leave vacancy has more than twenty-five years experience as a pharmacy technician at another

hospital, although she is not an RN. After the maternity leave is over, the hospital may continue to employ her for relief work in the pharmacy.

30. The job of Pharmacy Clerk was changed to Pharmacy Technician II in November of 1992.

Discharge Planner/Infection Control Nurse

31. Evie Cain presently holds the position of Discharge Planner/Infection Control Nurse. Ms. Cain has been a Registered Nurse since 1956. She has worked for the hospital since then. Immediately before taking her current position, she worked as an Admitting Officer. The Position Profile for her position states:

NATURE AND SCOPE OF RESPONSIBILITIES

- Co-ordinate and facilitate the patient's re-entry into the community in conjunction with families, nurses, physicians and referral agencies.
- Responsible for Infection Control and reporting of nosocomial infections.
- Responsible for notifying Medical Officer of Health of any contagious diseases.

MAJOR RESPONSIBILITIES

- Collaborate with community health care professionals to determine the most appropriate accommodation/placement for patients.
- Ensure that appropriate forms and applications required for placement or referral to other agencies are completed.
- Attend Utilization Committee and Chronic Care meetings.
- Provide inservice education regarding discharge planning to nursing staff.
- Follow guidelines of hospital policies and procedures.
- Provide funding information to patients and families.
- Assess needs of the hospitalized patients.
- Record all patients admitted with an infection.
- Environmental cultures when necessary.
- Recording of positive cultures on patients in hospital and preparing a monthly report for Infection Control Committee.

KNOWLEDGE AND SKILLS

- Registered with the Ontario College of Nurses.
- Familiarity with computers an asset.
- Excellent interview and interpersonal skills.
- Member of Community Hospital and Infection Control Association is encouraged.
- Member of Ottawa Organization of Practising Infection Controllers is encouraged.

32. As well, the Board was provided with a document titled "Department Manual Procedure" covering the position of Discharge Planning Nurse, which sets out the purpose of this department, the responsibilities of the position, the actions expected and their rationale. In this document, the hospital states that in general, the responsibilities of the Discharge Planner are to "identify, assess, plan, recommend, implement and evaluate patient discharge planning.

33. Essentially, the responsibility of the Discharge Planner is to coordinate and assist in planning for continuity of care for a patient who is being discharged. The Discharge Planner gathers information from various sources as to the patient's medical and social condition in order to coordinate the necessary services or care outside of the hospital. For example, an important part of this position is the referral of a patient to home care services, under which nursing care is provided to the patient at home.

34. The Discharge Planner gathers information from interviews with patients and their families, from her observations of patients (e.g. their mobility), the medical chart, including the medication profile, and from speaking to other members of the health care team in the hospital, such as doctors, staff nurses, the physiotherapist and the dietitian. Based on this information, she assesses the discharge needs of the patient. She may then, for example, recommend a home care referral. The recommendation is made to the patient's physician, who has the authority to order home care. The Discharge Planner may also be involved in helping the patient to apply for admission to a long-term care facility. Other services she may assist in arranging are volunteer visits by the Victorian Order of Nurses, Meals on Wheels, wheelchairs, etc.

35. If a patient is to be given home care, the Discharge Planner completes a home care referral form, which includes the nursing orders that will be the basis of the nursing care provided and any other specific needs of the patient based on the information she has gathered. Although for the most part the Discharge Planner gets the information for nursing and therapy orders from other sources such as the patient's chart, she does more than simply transcribe information. The Department Manual Procedure states that she is required to "[w]rite nursing and therapy orders and review the medications on client's discharge to the Home Care Program" in order to "ensure a written continuity of care and medication is provided so a smooth transaction from hospital to home (care giver) is maintained".

36. On her days off, Ms. Caine is replaced by either a staff nurse or by Geraldine St. Louis, one of the Pharmacy Technicians I who is an RN.

37. Although she has an office, most of Ms. Caine's time is spent in the nursing units. In her role as Discharge Planner, Ms. Caine attends nursing unit meetings once a week during which staff nurses report on the progress of patients in the unit. The purpose of her attendance is to be kept informed on the status of patients. Occasionally, Ms. Caine may make suggestions on the care of patients while in hospital so as to assist in their discharge planning. For instance, if a patient with mobility problems is being discharged into a home environment with stairs, she may suggest that nursing staff assist the patient in climbing some stairs during his or her recovery in the hospital. The Department Manual Procedure states that she is required to "[a]ttempt to assess clients with the nursing staff once a week" in order to:

[D]evelop a screening mechanism to identify clients who are at high risk of requiring more complex discharge planning and review the client's conditions so as to establish treatment goals that improve and enhance functioning level to maximize independence and revise the discharge plans when client's needs have changed.

38. Ms. Caine does not possess any certificates allowing her to perform any added nursing skills or sanctioned medical acts.

39. Ms. Moss testified that the job of Discharge Planner could be filled by a social worker, and that in some institutions, a social worker is employed in this function. There are some elements of what Ms. Caine does, however, that could not be performed by a social worker.

40. In her role as Infection Control Nurse, Ms. Caine receives culture and sensitivity reports from the hospital's laboratory. She gathers information with respect to the history of the infection from the patient's chart and then reports this information to the Infection Control Committee, of which she is a member. The reports are discussed by this committee to determine whether the infection is nosocomial in nature (i.e. originated in the hospital), and the pathologist makes the final determination. Ms. Caine spends about 1 to 1-12 hours on these duties per week.

"Employed in a Nursing Capacity"

41. The Board was provided with a number of documents from the College of Nurses of Ontario which set out standards and guidelines concerning the roles of Registered Nurses and Registered Nursing Assistants. The document titled "Standards of Nursing Practice" identifies the "minimum expectations for providing safe, effective and ethical nursing care" in the practice of nursing. Nursing practice is stated to be only one of four interacting dimensions of nursing; the others are management, education and research.

42. The most recent version of the Standards was published in 1990. In the versions before this, the Standards incorporated a list of "basic nursing skills". Although the current Standards incorporate descriptions of basic skills, they are less detailed and technically-described. The Standards state with respect to this change:

Skills lists, which were appended to previous versions of the standards, focused primarily on technical or psychomotor nursing skills. The new approach to skills in these standards emphasizes the knowledge, decision-making techniques, and communication techniques that RNs and RNAs must use in a time of rapid technological advancement, changing delivery patterns, and increasing complexity of care. It also reflects a shift in nursing from task orientation to goal orientation and integrates the performance of skills into the nursing process.

43. The evidence is that the move away from a technical skills list in the Standards is related to changes in health care in general. The nursing profession has developed a more holistic and generalist approach to patient care. Registered Nurses have expanded their role beyond the traditional health care institutions, to community-based agencies or clinics, and in health teaching and promotion. There are many RN's working in such roles as infection control, quality assurance, home care coordination and discharge planning. The role of nurses today overlaps to some extent with the roles of other both well-established and developing health care disciplines.

44. Other than the positions in dispute and persons excluded from the bargaining unit as managerial, the only person in the hospital who is an RN and who is not in this bargaining unit is the AED of Hospital Services. Prior to taking this position, this person was a purchasing agent within the hospital.

II

45. It is the position of ONA that its bargaining unit ought to include all registered and graduate nurses, excluding managerial personnel. In the alternative, it submits that the phrase "employed in a nursing capacity" should be interpreted broadly enough to include the positions in

dispute. In the final alternative, ONA suggests that the Board frame new language to describe its bargaining unit, in order to accommodate the reality of expanding nurses' roles. It suggests that the Board adopt the phrase, for example, "all registered and graduate nurses employed as health care professionals".

46. ONA acknowledged that there is a well-developed practice with respect to nurses' bargaining units in favour of the restriction which it seeks to eliminate, and that the onus is on it to persuade the Board to move away from this historical practice. To a large extent, the arguments of ONA are based on two factors: the lack of predictability in the application of the phrase "employed in a nursing capacity" and the community of interest amongst RN's working in health care institutions, regardless of job classification. The Board was provided with a large number of arbitration and Board decisions in which there was a dispute over whether a particular RN was "employed in a nursing capacity" and therefore included in the ONA bargaining unit. The litigation which has resulted over this phrase, it is submitted, does not make for good labour relations.

47. Further, a move away from this restriction enhances the mobility of nurses within the hospital, which is a positive labour relations result, without increasing fragmentation of bargaining units. With developments in health care, such a restriction imposes a glass ceiling on nurses by confining them within a one-classification box. As well, it imposes a cement floor for nurses who have moved beyond staff nurse positions in their career and, as a result of downsizing, have difficulty moving back into the bargaining unit.

48. It is submitted that the professional interests of nurses extends beyond those in staff nurse positions to include, for instance, the incumbents in the disputed positions. Further, it includes nurses who might have had a staff position, and because of lay-off, have taken a position within the hospital which is clearly not in a nursing capacity. These persons have a continuing community of interest with other nurses.

49. In any event, ONA asserts that all of the positions in dispute involve functions and responsibilities which are part of if not integral to the nursing profession and therefore fall within the phrase "employed in a nursing capacity".

50. In the hospital's submission, the Board has considered and rejected the position taken by ONA, in *Porcupine General Hospital*, [1987] OLRB Rep. Mar. 423. There is nothing different in the case before this panel, and no reason why the reasoning of the Board in that case does not apply here. Further, even if this panel were inclined to take a fresh look at the issue, the bargaining unit proposed by ONA violates the basic labour relations principles applied by the Board in fashioning bargaining units. ONA's bargaining unit is premised on professional community of interest which is very different from the employment-related community of interest that the Board has found relevant. The result of this is the possibility that different employees in the same job classification may be in two different bargaining units. This does not lead to viable and rational collective bargaining.

51. In dealing with the positions in dispute, the hospital asserts that the Board cannot isolate the various components of the Standards of Nursing Practice, and find that a person doing tasks found within these Standards must be engaged in a nursing capacity. To do so would mean that almost every employee in the hospital performs nursing functions. Rather, the Board should look at the practice of nursing as an integrated whole, and decide as a whole whether the persons in the disputed positions are working as nurses.

52. In addition to the arbitration cases dealing with the issue of "employed in a nursing capacity", the parties referred the Board to: *Kidd Creek Mines Limited*, [1984] OLRB Rep. March

481; *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266; *Porcupine General Hospital*, [1987] OLRB Rep. Mar. 423; *West Lincon Memorial Hospital and Ontario Nurses' Association*, (Board File No. 1001-87-R, dated October 11, 1989, unreported); *Strathroy Middlesex General Hospital*, [1992] OLRB Rep. Oct. 1103; *Sudbury Algoma Hospital*, [1989] OLRB Rep. April 390; *Victorian Order of Nurses*, [1984] OLRB Rep. Feb. 395; *The Toronto General Hospital*, [1986] OLRB Rep. Jan. 176; *The Wellesley Hospital*, [1974] OLRB Rep. Jan. 55; *Brockville General Hospital*, [1967] OLRB Rep. Jan. 776; *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380; *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *Essex Health Association*, [1967] OLRB Rep. Nov. 716; and *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266.

III

53. The Board does not accept the appropriateness of the bargaining unit description urged on us by ONA. In arriving at this determination, we have considered each of the factors relied on by ONA. Ultimately, we do not find that any of them support a change to the long-standing practice with respect to nurses' bargaining units.

54. As was acknowledged by counsel for ONA, there are good labour relations reasons for the Board to apply well-established practices with respect to the description of bargaining units, and predictability for the purposes of organizing is one of those reasons. We also recognize that from time to time, it may become apparent that history should not rule the day, and that the Board and the labour relations community should be willing to challenge outmoded assumptions about the organization of the workplace.

55. It is not clear to us that the unit which has been the well-established one for nurses has outlived its usefulness. The dividing line which has been drawn by the Board with respect to nurses working in the health care sector can be likened to the line which the Board has drawn around craft bargaining units, under section 6(3) of the Act, and in the construction industry. In *Porcupine General Hospital*, *supra*, the Board accepted the idea that the standard nurses' unit is a craft bargaining unit for which ONA could rely on section 6(3). In *Hospital for Sick Children*, *supra*, the Board stated that over time and through practice, nurses have acquired "almost a quasi-craft status" which entitles them to their own distinct and separate bargaining unit.

56. The standard unit for nurses, and for other craft-type units whose members hold professional or technical qualifications, has been confined to those employees who are actually engaged in the work of that craft or profession. The definition, for instance, of "professional engineer" in the Act speaks of those members of the profession "employed in a professional capacity" [section 1(1)]. The Act also speaks of employees in architecture, dentistry, engineering, land surveying and law "who are employed in their professional capacity" [section 6(4)]. As well, in the construction industry, the Board determines the members of a bargaining unit confined to a specific trade with reference to the actual work done by the employees, and whether it is the work of that trade. Thus, for instance, the Board will determine whether an employee who is a certified electrician was engaged in the work of an electrician at the time of an application for certification.

57. The result of attaining craft or craft-like status, whether by decisions of the Board or operation of statute, is that in a certification application (assuming the applicant to be a union which is the traditional representative of that craft), the Board assumes the viability of the unit, the community of interest amongst the members of the unit, and assumes the absence of any serious labour relations problems that would result from the granting of such a unit. The instant, however, that one moves away from the standard unit, these assumptions no longer apply.

58. ONA urges the Board to "go back to first principles" in assessing the bargaining unit

which it seeks. On these first principles, the Board has serious difficulty with the unit proposed. Essentially, ONA wishes to represent all persons who hold a professional qualification as a nurse, regardless of the nature of their employment. We accept that all persons who work in a health care institution share, at some level, a community of interest, just as all employees of a particular employer may be said to share a community of interest. Thus, it may be that an RN working as a purchasing agent (as has happened at this hospital) shares some community of interest with RN's working in their capacity as nurses. We also accept that beyond the general community of interest that might be shared by all employees at the hospital, there might be more of a shared interest amongst persons who have the same professional standing.

59. The consequence, however, of moving away from employment-related categories and lines of division between employees, is the potential that bargaining unit descriptions will become dependent on the incumbents that hold the positions in question. Thus, for instance, the result of the type of dividing line which ONA asserts is appropriate is that the RN who held the position of purchasing agent may be in the ONA bargaining unit, while the next person who holds the same position, who is not an RN, is not in the ONA unit. If there is more than one incumbent in the job, some may belong in one bargaining unit, and some in another. The labour relations difficulties presented by such a situation are obvious. Employees working in the same position may have different terms and conditions of employment, seniority structures and potentially career paths.

60. We do not accept, therefore, that the interest which may be shared amongst all RN's outweighs the interest as between employees working side by side in the same job classification, or outweighs the labour relations difficulties inherent in a bargaining structure based on personal qualifications. We see no reason to doubt, based on the factors relied on by ONA, the correctness of the Board's approach to craft and craft-like units.

61. This does not mean, however, that the Board may not find that an RN working in a position is engaged "in a nursing capacity" while a non-RN filling the same position is not. As observed by the Board in *Victorian Order of Nurses, supra*, the work of various health professionals are not enclosed in watertight compartments. Registered nurses filling a position might be expected to use their professional qualifications in the performance of their work and so are "employed in a nursing capacity", while a non-RN in the same position would fall outside of the unit. This is quite different from saying that all RN's who are clearly *not* working in a nursing capacity must also be in the nurses' bargaining unit.

62. Further, although ONA decries the amount of litigation that has arisen over the use of the phrase "employed in a nursing capacity", the decisions that have emerged do provide certain principles that can guide the parties and, on some level, contain an element of predictability. To summarize some of the principles in these decisions which are most applicable to the case before us:

- (a) "employed" or "engaged in a nursing capacity" means something broader than performing hands-on nursing or direct patient care;
- (b) the phrase identifies incumbents of positions "in which the individual, who is already a registered or graduate nurse, is employed in a position in which he or she is expected to possess the training and skills of a nurse in order properly to carry on her work": see *La Verendry General Hospital, (Fort Frances) Inc. and Ontario Nurses' Association*, (December 15, 1980) unreported (Abbott);
- (c) the fact that the qualifications for a position require a Bachelor of Science degree in Nursing or its equivalent and experience in nursing would not necessarily by itself be sufficient to make employment in a "nursing capacity": *Beacon Hill Lodges (1984) Limited*, (2 December 1987) (Brunner);

- (d) however, the fact that a degree or qualification in nursing is required for a position is a strong indicator that the training and skills of a nurse are required in order to properly carry out the work: see *Victorian Order of Nurses*, *supra*;
- (e) as observed in *Victorian Order of Nurses*, the “professional skills exercised by various health care professionals are not enclosed in watertight compartments”. A position for which an RN is required may be employed in a nursing capacity, but if in future the position is filled by a non-RN it may then fall outside the nurses’ unit.

63. In our view, many of the concerns which were expressed by ONA with respect to the narrow scope of its bargaining unit description can be accommodated within the above principles. To the extent that ONA is concerned that the traditional description imposes a glass ceiling on nurses by confining them to a one-classification box, it is apparent that this is no longer true. In arbitration and Board decisions on the issue, the concept of “employed in a nursing capacity” has been applied flexibly, to include positions far removed from the traditional staff nurse. Developments in health care, in the variety of health care roles and skills, and in the concept of what it is to be a nurse within the health care system, can be taken into account within the existing principles. Thus, it may well be that the notion of “employed in a nursing capacity” is not static, and is different today from what it was a few decades ago.

64. In conclusion, we see no good reason why the traditional description of the nurses’ bargaining unit ought to be amended in the way sought by ONA. We therefore find that the appropriate bargaining unit description ought to include the phrase “employed in a nursing capacity”.

65. The parties ask in light of this where the predictability lies, and how it can be determined when a person is “employed in a position in which he or she is expected to possess the training and skills of a nurse in order properly to carry on her work”. Without pretending to reconcile all of the strands within the cases cited, in our review of them we have found that in *every* case (about 10) in which the employer required an RN qualification for the position, the position was found to be employed in a nursing capacity. There were *no* cases cited to us where an employer required an RN for the position in the dispute, and the position was found to be outside the nurses’ bargaining unit. It appears to us, therefore, that unless it is very clear that an RN requirement is an anomaly, and the position has only the most peripheral relation to nurses’ training and skills, it will be difficult for a party to argue that a position which requires an RN qualification is not one in which an incumbent is “expected to possess the training and skills of a nurse in order properly to carry on her work”.

66. Applying the above principles to the positions in dispute before us, we are satisfied that all of them are in the bargaining unit. By requiring a current certificate of competence as an RN for each of these positions, the employer has indicated that it expects the incumbents to possess the training and skills of a nurse in order to carry on her work. In none of these cases can it be said that the requirement to have an RN qualification is an anomaly in terms of the duties of the job and is clearly unrelated to those duties. Further, in none of these cases can it be said that the position has only the most peripheral relation to nurses’ training and skills. To a greater or lesser extent, the knowledge and skills exercised by the incumbents in these positions are related to the knowledge and skills acquired in RN training, and exercised by RN’s working as staff nurses.

67. The position of Nurse Clinician is perhaps the easiest one to determine. In fulfilling the role of on-site educator of staff nurses, Ms. Wright is clearly required to maintain and upgrade her own knowledge of the nursing process and its specific applications. She is required to maintain her technical skills, for the purposes of teaching and demonstration. She does not have much direct patient contact but is regularly called upon as a resource person to assist in resolving nursing problems.

68. We are also satisfied that the position of Nurse Clinician ought not to be excluded from the Act by virtue of section 1(3). To the extent that Ms. Wright supervises the skills of the nursing staff, we are satisfied that the supervision is professional and not managerial in nature. Although Ms. Wright's assessments of a nurse's competence to perform added nursing skills may be relevant to decisions on discipline or discharge, there is no evidence that she ever makes recommendations or decisions on these measures. These decisions are made by Nurse Managers or those above that rank. Rather, Ms. Wright's role is to assist nurses in attaining the knowledge and skills which will enable them to perform the nursing skills required.

69. With respect to the Discharge Planner, we place significant weight on the hospital's requirement that the incumbent be an RN. It may well be that other hospital have hired non-RN qualified personnel to perform similar functions in the role of discharge planner. It is a job whose functions appear to overlap with other professionals, such as social workers. Many of the functions are administrative in nature. However, it is clear that the hospital expects its Discharge Planner to have the knowledge and skills of an RN in order to perform her job, and in our assessment, this expectation has a reasonable relation to the functions actually performed by Ms. Caine. In assessing a patient's discharge needs, Ms. Caine augments the patient chart and other information with her own observations with respect to that person's ability to perform necessary tasks of daily living after discharge from the hospital. As part of her role as Discharge Planner, she attends nursing unit meetings and is expected by the hospital to have some input into a patient's care where that is related to the discharge planning.

70. The position of Pharmacy Technician I is perhaps the most problematic and again, we place great reliance on the fact that when the incumbents were hired, the hospital required an RN qualification for the position. We are reluctant to place much weight on the hospital's stated rationale for this requirement, that it wished to hire from within and provide its staff nurses with the opportunity of movement within the hospital. This purpose could easily have been met without restricting the incumbents in the position to RN-qualified personnel. Rather, we are inclined to conclude that the hospital wished to have persons with the training and skills of an RN for this position. RN training includes pharmacology, and the staff nurses in the hospital are routinely involved in the dispensing of medication to patients. It was to the hospital's advantage that it have persons with this training and experience for the position. It is also significant to us that the work of the Pharmacy Technician I was, before 1984, performed by staff nurses in the nursing units. As well, staff nurses currently perform some of the same functions as the Pharmacy Technician I, in dispensing medications from ward stocks. We do not rely in our findings with respect to this position on the fact that some of the present incumbents may occasionally work a casual shift as a staff nurse (and we do not understand ONA's position to be based on this factor).

71. Thus, before the position was created, the functions had been fulfilled by staff nurses. After the creation of the position, all of the incumbents have been RN's, and until 1992, all were required to be RN's. Only in 1992, after this application was filed, did the hospital change the qualifications for this job in order for it to hire a non-RN as maternity relief. After this temporary placement is over, all of the regular incumbents will again be RN's.

72. It may be that the hospital has decided that it can accept alternative qualifications to the RN qualification for this position. It has changed the Position Profile to reflect this. If one of the incumbents leaves and the hospital hires a replacement under the new Position Profile who happens to be an RN, there may be a question as to whether this person is in the nurses' bargaining unit, for it may be less certain that the hospital expects that Pharmacy Technician I to possess the training and skills of a nurse in order to perform the duties of the job. This is not the case before us. The dispute before us concerns RN's working in the position of Pharmacy Technician I who

were hired at a time when the hospital required this as a qualification, and have worked until very recently under a job description which required this qualification. We are satisfied that in the circumstances, the hospital has and continues to expect these persons to possess the training and skills of an RN in order to perform their job.

73. By our decision, we intend only to make the findings necessary to resolve the positions in dispute between these parties. In particular, while we are satisfied that the RN's currently holding the position of Pharmacy Technician I are included in the bargaining unit, we do not make any findings as to the status of any RN who may be hired into this position in the future.

74. In conclusion, the Board finds the following unit to be appropriate for collective bargaining:

all registered and graduate nurses employed in a nursing capacity by the Pembroke Civic Hospital in the City of Pembroke, save and except Nurse Manager, person above the rank of Nurse Manager and persons regularly employed for not more than twenty-four (24) hours per week; and

all registered and graduate nurses employed in a nursing capacity by the Pembroke Civic Hospital in the City of Pembroke regularly employed for not more than twenty-four (24) hours per week, save and except Nurse Managers and persons above the rank of Nurse Manager.

75. For purposes of clarity, the Nurse Clinician, Discharge Planner/Infection Control Nurse and the Registered Nurses currently employed as Pharmacy Technicians I are included in the bargaining unit.

76. A final certificate shall issue to the applicant.

DECISION OF BOARD MEMBER R. M. SLOAN; October 19, 1993

1. I dissent only with respect to that part of the majority decision that deals with the Pharmacy Technician classification. I concur with all other aspects of the majority decision.

2. There is abundant evidence to show that holding a certificate of competence as a registered or graduate nurse is not a requirement in order to qualify to perform the functions of a Pharmacist; a Pharmacy Technician I; or a Pharmacy Technician II. In fact, we know that a number of incumbents currently employed in the afore-mentioned positions do not hold such certification and indeed, are not now, nor have ever been registered or graduate nurses.

3. The majority decision recognizes this and directs and limits its findings with respect to ONA bargaining unit membership only to those three incumbents who had previously been employed as Staff Nurses and have been assigned on an occasional basis to perform the functions of a Staff Nurse while classified as Pharmacy Technologist I.

4. It is my view that it is a serious anomaly that will create difficult and vexing labour relations problems to have employees in the same job classification, doing identical work (except for the occasional and infrequent relief work as Staff Nurses as referred to in the previous paragraph) with some of those employees being independent of union representation while others are represented by a trade union.

5. In my view, the solution to the matter is quite simple. Exclude all members of the pharmacy group from the ONA bargaining unit. ONA, ultimately, only claims those employees who are Registered Nurses, as I understand their position, not for their "pharmacy" functions but

because they are employed from time to time as Staff Nurses. When the three R.N.'s who are employed as Pharmacy Technician I are temporarily assigned as Staff Nurses they would be subject to the terms and conditions of any collective agreement that might be in effect at the time of, and during the temporary assignment. The temporary assignment of employees into classifications that are not their regular classifications and the transfer of employees into and out of bargaining units is not an unusual occurrence.

6. I agree with the majority decision which finds that the position of Discharge Planner/Infection Control Nurse is properly included in the bargaining unit on the basis that, in order to perform an integral part of the job functions, the incumbent is required to hold a current certificate of competence as a Registered Nurse. This is in sharp contrast with the Pharmacy Technician I position (and all other positions in the pharmacy section of the hospital) where none of the intrinsic job duties require the holding of a certificate of competence as a Registered Nurse.

1467-93-R Labourers' International Union of North America, Local 1059, Applicant v. Sifton Properties Limited, Responding Party

Bargaining Unit - Certification - Employer operating property management business and employing food court staff, maintenance workers, security guards, customer service representatives and child care workers - Union applying for certification and proposing bargaining unit of maintenance and cleaning employees - Employer arguing for all-employee unit - Board concluding that union's proposed unit would result in undue fragmentation and serious problems, not merely inconvenience

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. H. Wightman* and *G. McMenemy*.

APPEARANCES: *Carolyn Hart*, *Jim McKinnon* and *Gerry Varricchio* for the applicant; *Chris White*, *Ken Morris* and *Deborah Graham* for the responding party.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN:
October 27, 1993

1. This is an application for certification in which the parties have been unable to agree on the description of the appropriate bargaining unit. The applicant is seeking, as its primary position, a bargaining unit made up of cleaners and maintenance workers as follows:

all maintenance and cleaning employees of Sifton Properties Limited at Westmount Shopping Centre, 785 Wonderland Road South, London, Ontario, save and except forepersons and persons above the rank of foreperson.

In the alternative, it proposes including security guards within the unit as well. By contrast, the responding party argues for an all employee unit, subject to certain exclusions which are not disputed by the applicant, as follows:

all employees of Sifton Properties Limited employed at Westmount Shopping Centre, 785 Wonderland Road South, London, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff, engineering and technical staff, and sales staff.

In response, the union takes the position that the customer service representatives are clerical and therefore part of the agreed on exclusions.

2. At the outset of the hearing the parties canvassed the list of employees who would be in the unit that the responding party is seeking and not in the applicant's proposed unit. After discussion there were no challenges to the list in either proposed unit. These lists show twenty employees in the cleaning and maintenance unit and thirty-five in the unit sought by the respondents. If the applicant's unit were to include security guards there would be twenty-seven employees in the unit.

3. The panel heard two days of evidence as well as argument on this matter. The pertinent evidence is summarized below. It is fair to say that there was no serious dispute about the facts although there is an important difference in characterization and emphasis.

4. The responding party (referred to below as "Sifton", or the employer) is in the business of property management. It has built and runs three shopping malls, the Westmount Mall in London, the subject of this application, as well as the Stone Road Mall in Guelph, and the Tilsonburg Town Centre. Sifton has its head offices for the three malls in the Westmount Mall, as well as the administrative offices for the Westmount Mall itself. Sifton leases approximately 200 stores to a variety of retail tenants at the Westmount Mall. Prior to its opening in an expanded form in 1989, the mall housed 80 stores.

5. Sifton employs directly both the employees in its administrative offices and the five categories of employees which are the subject of the application or would be included in the responding party's proposed unit. These classifications (with the numbers of employees on the agreed list for each) are as follows: food court staff (6), maintenance staff (17-both interior and exterior), security guards (7), customer service representatives (5), "Let's Play" employees, (3 child care workers). There are about sixty to eighty staff in the office of the Head Office, who are not the subject of this application or dispute.

6. The food court is an area of the mall with food counters and a seating area. Food court staff are primarily employed to clean the food court area, but also do a rotation cleaning out in the larger mall every five weeks or so. When in the food court they are responsible for keeping the tables, trays and floors clean and clearing garbage. Security employees are assigned to the food court between the hours of 11:30 and 2:00 when students from a local high school congregate for lunch. During that time period, one of food court's busiest, while patrolling, or when there is little to do, security employees pick up trays, clean up spills and do other things to assist the food court employees. Food Court employees are entitled as well to enforce behaviour norms and the policy that patrons must have purchased food and drink to use the tables, by asking people to leave, although when things get out of hand, they call security.

7. Inside maintenance workers do a variety of tasks related to cleaning and repairing the mall's physical plant, within a set routine. They may also be called by security or customer service to do additional tasks as needed, for example to clean up spills. They cover Sundays in Food Court and may relieve there for breaks when it is busy. Often a security guard will stay near a spill until the maintenance people can come to clean it in order to prevent patrons of the mall from slipping. Occasionally, a security guard will also clean up a spill themselves and they have access to the cleaning equipment.

8. Those doing outside maintenance take care of the grounds, parking lot and underground parking garage. On rainy days they change lights and clean inside around the elevator lobby. One supervisor takes care of janitorial maintenance and minor repairs, while the other is in charge of exterior and interior maintenance of other kinds.

9. The security guards patrol the mall and the parking garage, dealing with emergencies, helping customers in need and responding to calls from tenants and staff. They also cover customer service and Let's Play for breaks and when needed at other times. Their duties in the Food Court at lunch hour include trying to keep the students under control and making sure they have something to eat or drink. As mentioned above, security helps out in Food Court while assigned there. Security workers have the right to detain an individual if necessary and to attempt to control fights. Security may call any available staff if an incident of sufficient size occurs, such as a fight involving several people. Other employees, such as from maintenance, may assist security when it is busy. There was no evidence that the security guards had any function in monitoring other employees.

10. Employees classified as customer service representatives staff the customer service desk. Customers may obtain information there as well as buy tickets to local sporting events or obtain wheel chairs or baby carts. The staff also do gift wrapping and collect money for Let's Play, a child care service to shoppers. From one to four employees are assigned to the desk, depending on how busy they are. Let's Play and security employees relieve customer service representatives equally often. One person in customer service also works in marketing on occasion.

11. Customer service staff operate the switchboard facilities for the shopping centre in general. They answer general inquiries and transfer calls for the administrative staff. About eighty to ninety percent of the calls received in customer service are queries about the shopping centre. The budget for the customer service department desk comes from the marketing fund. Two marketing employees, the Events Co-ordinator and the Marketing Director, supervise the employees in customer service. Customer service employees sometimes work in the administrative area, building displays because of the space available in the administrative area which is down the hall from the customer service desk. They may also spend a minimal amount of time there typing memos and copying flyers. Customer service has delivered memos to tenants and done as many as several hundred photocopies in one day for the marketing department but this latter is not the norm. Customer service staff spend sixty to seventy percent of their time at the counter and the remaining time covering off Let's Play breaks. On a less frequent basis if the Food Court is busy, customer service representatives may help out in doing the trays there. It is a regular occurrence leading up to Christmas.

12. "Let's Play" provides short term child care to shoppers. Full-time staff are required to have an early childhood education certificate or its equivalent. There are normally two people in Let's Play. The Let's Play staff have helped out in the customer service counter (which is adjacent to Let's Play) with whatever duties are necessary, when needed. On an exceptional basis Let's Play staff help out in Food Court.

13. Duties that are seasonal, or arise only occasionally, like putting up Christmas decorations, are done after regular hours by inside maintenance supplemented by other employees recruited across the classifications on a volunteer basis after hours.

14. There are night cleaners who are employed by a sub-contractor rather than the responding party. As well, certain other services are contracted out, including elevator and escalator maintenance, pest control and certain special projects. About a year ago, when there were problems among the staff of Food Court, Mr. Powell told them that they should settle the problems among themselves or that he had three options. These options were working with them to sort out the problems, replacing everyone or contracting out the whole area. These were in reverse order of desirability and only the first one was pursued.

15. The employer stresses the extent to which employees are deployed in other classifications. Besides the examples set out above, the parties agreed that one employee had started in the

position of security guard and moved to a customer service representative position in which category he worked for a year and a half. In the six months prior to the hearing he had been employed in outside maintenance. A security guard also cut grass on four occasions in the last six weeks outside the hours of the maintenance day shift because of a backlog. One of the Food Court employees had a six month stint in Let's Play at her request and sometimes fills in there when they are short. She has also filled in doing maintenance duties.

16. Food Court employees have been asked to go to Let's Play on Saturdays and cover cleaning rounds on the floor. On occasion, people might be moved around into Let's Play from Food Court to allow somebody from Let's Play to go and help out in Food Court when Food Court was busy. As well a maintenance worker has filled in at customer service, two to three times in the last seven to eight months.

17. If the centre is busy and the outside people need a hand for snow removal, anyone capable and available is asked to go outside and the reverse applies as well. For instance the outside maintenance workers have been required to help security at Food Court and are asked to be available for special projects such as repairing fences or working in a flower bed.

18. Two individuals have had part-time jobs in more than one classification. One whose part-time jobs were interior maintenance and customer service, recently gave notice that she was leaving her cleaning job in order to move full-time to customer service. She always performed cleaning when she was on the cleaning schedule during the period when she was employed in two classifications.

19. Although several employees work in other classifications as indicated above, other employees have never or rarely done so. The union witnesses, for example, indicated little knowledge or information about the duties of other classifications. Employees who have requested work in other classifications or who have exhibited more flexibility or comfort with moving to other classifications are more likely to be assigned such work. Interchange in general occurs more extensively during busy seasons such as Christmas and on weekends.

20. Around the time the expanded mall opened in 1989 and afterwards, management started to focus on a new approach to enhancing its service to its customers. This included highlighting the role of tenants as Sifton's customers and offering seminars to both tenants and staff on areas related to customer service. Day long seminars were offered to all staff. A number of witnesses had no recollection of the seminars, while they were very important to at least one. Employees were paid for customer service seminars that occurred when they were not scheduled to work. Outside personnel were brought in to cover for those who were scheduled to work during the period in which the seminar occurred. It was the evidence of Al Lebon, General Manager of the division of Sifton which manages the Westmount Mall, that an allied approach was to de-emphasize traditional departments which in his view lead to an emphasis on particular functions, like cleaning, rather than an overall goal of customer service. Some management staff were let go to facilitate this change of emphasis. A move to a single uniform for all staff went along with this, to give the public a visibly unified image of staff presence. Earlier, different classifications wore different coloured shirts. Supervisory staff also rotate through supervising the whole mall one week out of six to further the unified approach.

21. As part of the above thrust, the customer service desk was installed, equipped with fax and photocopying capacity, wheel chairs and baby carts. Mr. Lebon was insistent that this was not the only locus of customer service, that all staff were expected to emphasize customer service. Mr. Lebon sees the difference in the Sifton approach as being demonstrated in the fact that if someone needs help, no matter the department, everyone will help each other. It was Mr. Lebon's view that

the staff would no longer be able to be customer service oriented if the bargaining unit the union had applied for was given, that they would go back to a function oriented approach which was what Sifton had moved beyond.

22. Tom Powell, Operations Manager, said that there was now an even salary structure across the classifications, but this was not borne out as universal in evidence, although the Board does not have a complete picture of the extent of the deviations. Increases are given by seniority once a year on the recommendation of the Operations Manager and do not necessarily coincide with changes in position. Part of the customer service idea was to try to keep the wages of various classifications balanced, so that moving from one department to another was not a promotion but a lateral move.

Decision

23. The parties accepted the test articulated in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266: does the unit the applicant seeks to represent encompass a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. What the applicant seeks here is a unit of cleaners and maintenance workers as its primary position. In the alternative, it is prepared to accept the appropriateness of a unit that would also include security guards. It maintains that the employees who work in Let's Play and customer service have no community of interest with the workers it seeks to represent. Based on the similarity of skills and the type of work performed by the cleaning and maintenance people, we were urged by the applicant to find that the cleaning and maintenance workers had a sufficient community of interest to bargain together. We were urged to find that the balance of involvement with the physical plant, as opposed to people, was at one level for the maintenance workers and at the opposite extreme for customer service and Let's Play employees. This was argued as the basis of a sufficiently different community of interest to warrant separate bargaining units.

24. As well, we are urged by the union to find that the common elements addressed by the employer, including uniforms, a wage scale, and seminars do not give rise to a compelling comprehensive community of interest. The union emphasized in its argument that there was no evidence of cross-training or regular rotation in the different classifications and that no one is ordered to work in other classifications.

25. In considering the amount of cross-over that the evidence does show among the classifications, the union urged us to find that it was not very extensive and that it made no labour relations sense to lump together cleaning and maintenance workers with other employees with whom they have little contact and about whom they know little. Counsel summarizes the interchange as four specific individuals who have moved around, two having held part-time jobs in different areas.

26. On the issue of community of interest, the employer argues that the recent thrust of Board decisions is to find community of interest on a broader basis than earlier on in the Board's jurisprudence and we were urged to apply that concept to these facts.

27. Based on the concept of community of interest articulated in such cases as *Canada Trust and Mortgage Company*, [1977] OLRB Rep. June 330, there are levels of community of interest which range from all the employees in an enterprise to smaller groupings, depending on the circumstances. We are persuaded that the maintenance group of employees could likely bargain together on a viable basis, although the larger grouping is also viable. This idea is supported by the case relied upon by the applicant *Kaneff Properties Limited*, [1978] OLRB Rep. May 431.

28. The more difficult question in this case is the second part of the test from *Hospital for Sick Children*. Does the unit proposed cause serious labour relations problems for the employer? The employer says that it would, that the evidence on interchange of functions shows that the staff has effectively been totally integrated. Further, it argues that a unit of just cleaners would stand in the way of the implementation of the customer service project, sow the seeds for jurisdictional disputes and create bargaining difficulties over the work of the bargaining unit. The employer describes this as a critical issue at the bargaining table in most circumstances and that in a situation such as this where there is regular exchange, this would be ever more the case. Employer counsel stresses that the unit proposed does not create a maximum of two units but at least three, in that security could organize with customer service or Let's Play or remain separate.

29. In many cases, the Board has underlined its reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmentation in bargaining which that creates, as expressed in the following passage from *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. June 736:

23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Roscoe Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton's Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In *Eaton's*, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen:

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25. Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the *Canada Labour Code* to delete the provisions (similar to section 6(3)) protecting craft bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see *Feed-Wright Limited*, [1979] 1 Can. LRB 296; *Atomic Energy of Canada Ltd.* (1978), 1 Can. LRB 92; and *Cablevision Nationale Ltée* (1979), 3 Can. LRB 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour

boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

The Board has departed from that approach on the agreement of the parties and in particular situations of historical anomaly, or in light of the history of a particular sector, acceding to requests for classification-specific bargaining units in some cases. As well, where the applicant has been able to show difficulties with access to bargaining, particularly in situations where the respondent was in effect asking the union to organize more than one work site, the Board has balanced the interests of the parties, given particular weight to the organizing interests of the employees and certified unusual bargaining units. However, it has never done so lightly, or without a particular reason to do so.

30. There are units of cleaners and maintenance workers which have been found to be appropriate by the Board, often on the agreement of the parties and/or in circumstances where the employees in question are employed by a cleaning contractor to work at another employer's premises. *Kaneff Properties Limited*, cited above, was referred to as an example of cleaning staff being given a separate unit. We note firstly that the actual bargaining unit description in that case is in terms of all employees at a certain address, subject to managerial and office and clerical exclusions. This was a situation where the cleaning staff spent all of their working time in one building with no interchange with employees working in other buildings operated by the employer in that case. We do not find this case to assist greatly in the resolution of this portion of the dispute before us, which involves five classifications at one work site. We were referred to no cases where, as here, the employer directly employs cleaners, among other classifications, at one work site.

31. We agree with the union's submissions that an all employee unit is not necessary to meet the employer's customer service goals. Nor do we find the extent of interchange a compelling reason for separate units, although it is significant. However, other matters raised in objection to the proposed unit are more serious.

32. Fragmentation, with all its deleterious effects, is the main objection of the employer to the unit proposed. Dealing with this issue, union counsel said that the community of interest between Let's Play and customer service show that the remaining employees could form their own unit and that they would not be a group too small to bargain. It was union counsel's view that the maximum number of bargaining units in this work place was two, while employer counsel referred to three. There is also the possibility of the organization of the employees of whom the exclusion is not disputed, e.g. office, clerical, sales, technical and engineering. Thus, the potential may be four or more separate bargaining units, if a pattern of certification by classification is allowed. Nor were we given reason to assume that these other groups would be organized by the same bargaining agent, allowing later combination under section 7 of the Act.

33. We are of the view that the classic problems caused by fragmentation which underlie the fact that the Board's most standard unit is an all-employee unit, are a serious concern in this fact situation. These problems include the increased likelihood of strikes, the triggering of jurisdictional disputes and employee "enclaves" coextensive with each bargaining unit, and the increased complexity and expense of administering several collective agreements. They are potentially serious problems, rather than mere inconvenience. Although in an unorganized context such as this there is always some element of uncertainty as to the extent to which such problems will actually develop, the Board has an obligation to attempt to avoid serious structural problems at the outset when possible. We are aware of no particular circumstances in this workplace which would cause us to find that there is a problem with access to organizing or exercise of the employees' rights to choose their own bargaining agent if we find this unit to be inappropriate. In particular, there are none of the circumstances present in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250 relied

on by the union. There the Board was dealing with a choice between a unit of all employees in a single store (comprising presumably a number of classifications) or all employees in four different stores. The Board there underlined that the balancing of interests in that particular sector caused the Board to find a single location unit to be appropriate where there was little or no interchange of employees between locations and the union had organized on the basis of one location, as a broader based structure might significantly impede employee access to collective bargaining.

34. The union argued that the customer service staff are performing a clerical or sales function. We do not find the evidence to be sufficient to support a finding that these are clerical employees. It is not apparent that much of their time is spent doing paper or clerical work of any kind. It would appear that they are mostly doing switchboard and counter service to patrons. Although it is true that they do perform a minor number of clerical duties for the administrative office, their focus is on the public and tenants and not apparently on the internal workings of the administrative office where the employees agreed to be excluded work.

35. For the reasons set out above, we find that the applicant's proposed unit is not the unit of employees that is appropriate for collective bargaining. The one proposed by the responding party would be an appropriate unit.

36. The applicant's support as measured against the wider unit indicates that more than forty percent of the employees had applied for membership by the application date. We will order a representation vote in the wider unit if we are advised by the applicant that that is its wish within 30 days of this decision. The employer requested a bar if the application were to be dismissed as a previous application for certification related to the same employees had been filed and withdrawn. That matter may be raised in the event the applicant is unsuccessful in a representation vote.

DECISION OF BOARD MEMBER G. MCMENEMY; October 27, 1993

1. I dissent from the majority decision.

2. I agree with that part of the majority decision which finds (at paragraph 27) that the bargaining unit which the trade union seeks to represent consists of a group of employees which could likely bargain together on a viable basis. Although the larger grouping which the employer proposes in its bargaining unit description may also be viable the Act requires the Board to determine "an" appropriate unit, and not necessarily "the most" appropriate unit. Either one of the units which the applicant seeks is a viable bargaining unit which would allow the employees and their Union which they have chosen to effectively bargain with their employer.

3. I also agree with that part of the majority decision which finds (at paragraph 31) that an all employee unit is not necessary to meet the employer's customer service goals. The employer went on at great length about their new "customer service" program and maintained that the success of the program depended on their ability to transfer employees from classification to classification during the day to day operations of the Mall as the need arose. In my view the evidence shows however that the customer service training seminars were directed primarily at the mall tenants. There were only a few seminars of marginal relevance directed at the responding party's own employees. Some employees had never attended any of the seminars and were unaware of them.

4. The majority addresses the issues of fragmentation and serious labour relations problems. It is with this portion of the decision that I disagree with the views of my colleagues in the majority. Although I agree that serious labour relations problems are a concern which this Board must be aware of in all cases before it, I do not believe that serious labour relations problems will

result if the Board certified the trade union for either of the bargaining units agreed to by the trade union.

5. As the majority notes, the extent of interchange amongst employees, although significant, is not in this case a compelling reason for separate units. In my opinion the issue of transferring employees from one position to another position during Mall operations is not the serious labour relations problem which the responding party would have the Board believe it is. The majority of the cases shown to the Board involve employees who are either in the bargaining unit that the applicant has applied for, or in the bargaining unit that the applicant has agreed to as an alternative. The cases illustrate the work of employees who fall mainly into the following examples, security guards cutting grass; security guards cleaning up in the food court, when it is slow; food court employees cleaning in the Mall outside their main area of work, and inside employees who clean up the occasional spill. This interaction amongst these employees shows a community of interest.

6. There were other examples given to the Board, that in my opinion would not cause the Employer any problems. These examples given to the Board are proposed bargaining unit employees doing jobs that are outside the bargaining unit sought.

7. In a very limited number of cases there are examples of what would be non bargaining unit employees doing bargaining unit work. That problem could and would be overcome by responsible parties negotiating a collective agreement to address that

8. In my opinion the employees of the customer service desk and "Let's Play" do not have a community of interest with the other employees of the Mall. These employees have separate community of interest amongst themselves or perhaps a community of interest with the office and clerical staff which the parties agree are excluded from this application.

9. I am also of the opinion that if this application is dismissed, the employees who have chosen to deal with their employer through Union will be denied their rights today and in the future.

10. Just as the Board has to be aware of future labour relations problems caused by fragmentation, it also has to be aware of the possibility of denying the rights of employees by making the bargaining units too large to organize by encompassing employees who have very little in common in their work place.

11. It appears to me that the serious labour relations problems in this case are based on a potential dollar cost to the employer. The cost of negotiating an agreement and any other costs which may flow from having a Union speaking on behalf of the employees, is a cost of doing business and nothing more. It is not a reason to deny the rights of the employees to form a Union of their choice, with their fellow employees with whom they share a common interest at work.

12. I would therefore have found either of the bargaining units proposed by the trade union to be appropriate and, if the level of support was sufficient would have certified the trade union.

3438-92-M United Steelworkers of America, Applicant v. Tate Andale Canada Inc., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board noting exceptionally broad language of section 92.1 of the *Act*, as well as its "facilitative" or "forensic" thrust - Board explaining advantages of timely intervention without finding fault - Board assessing potential harm in making or not making interim order from perspective of employer, union, aggrieved employees and other employees who may be affected by impugned conduct and directing interim reinstatement of discharged employees pending disposition of unfair labour practice complaint

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *Robert Healey* for the applicant; *John W. Woon*, *Brian McBain* and *Brian Boucher* for the responding party.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER H. PEACOCK; October 13, 1993

1. This is an application for an "interim order" and/or "interim relief" filed in conjunction with an unfair labour practice complaint. For convenience, we will refer to the applicant as "the union" and the proceeding simply as an application for "interim relief". We will begin with certain background material, then turn to the substantive issues in the case.

I - BACKGROUND

2. In the underlying unfair labour practice complaint, the union contends that employees Heath Sweetman and Rod Cake have been discharged because of their trade union activities. The union asserts that those discharges contravene a number of sections of the *Labour Relations Act*:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

* * *

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. Each of these sections has a slightly different focus, but taken together they serve at least three distinct purposes: they protect the institutional interests of the union, they bolster the employees' right to organize, and they provide specific redress for individuals who have been the target of employer misconduct. The statutory framework for litigating complaints of this kind includes these provisions:

1.- (2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person's ceasing to work for the person's employer as the result of a lock-out or strike or by reason only of being dismissed by the person's employer contrary to this Act or to a collective agreement.

* * *

91.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned; with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

* * *

92.2-(2) If the trade union requests an expedited hearing of the complaint, the Board shall begin its inquiry into the complaint within fifteen days after the later of,

- (a) the day on which the request is filed with the Board; and
- (b) the day on which the request is delivered to the respondent named in the complaint.

(3) The Board shall hear the complaint on consecutive days from Mondays to Thursdays, except holidays, until the hearing is completed.

(4) The Board shall render its decision on the complaint within two days after the hearing is completed, excluding Saturdays, Sundays and holidays. The Board may give its decision orally or in writing.

(5) The Board shall give written reasons for the decision within a reasonable period of time upon the request of either party.

(6) The Board may hear and determine any other application or complaint under this Act together with a complaint to which this section applies.

4. The significance of the unfair labour practice protections is underlined by the way in which the Board is obliged to deal with them. A person unlawfully discharged continues to be an employee for the purposes of the Act (section 1(2)), notwithstanding any termination of the common-law employment relationship, and the employer has the legal burden of proving that its actions were *not* unlawful (section 91(5)). Upon request, the Board is required to begin hearing the case within 15 days of receiving it. If a violation is found, the Board has broad powers to rectify the situation, and if an employee has been unlawfully discharged, the Board will usually order reinstatement, with compensation, and direct the employer to post a notice advising employees of this result and informing them of their rights. The overriding objective is spelled out in section 2.1 of the Act, which reads, in part:

The following are the purposes of this Act.

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

• • •

4. To provide for effective, fair and expeditious methods of dispute resolution.

5. In this application for interim relief, the union seeks “provisional” reinstatement of the grievors, pending the disposition of the “main” unfair labour practice complaint. The request for interim relief was filed on February 24 and heard on March 1. The hearing of the main application was scheduled to begin on March 11. In practical terms, therefore, the union was seeking interim reinstatement of the aggrieved employees for the several weeks that it might take to hear the merits of the complaint.

6. The provisions of the Act dealing with “interim relief” are as follows:

92.1-(1) *On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.*

[emphasis added]

* * *

104.-(14) The Board may make rules to expedite proceedings to which the following provisions apply:

1. Section 11.1 (rights of access), 73.1 (replacement workers), 73.2 (use of specified replacement workers) or 92.1 (interim orders).

* * *

(14.1) Rules made under subsection (14) come into force on such dates as the Lieutenant Governor in Council may by order determine.

(14.2) Rules made under subsection (14),

- (a) may provide that the Board is not required to hold a hearing;
- (b) may limit the extent to which the Board is required to give full opportunity to the parties to present their evidence and to make their submissions; and
- (c) may authorize the Board to make or cause to be made such examination of records and such other inquiries as it considers necessary in the circumstances.

(14.3) Rules made under subsection (14) apply despite anything in the *Statutory Powers Procedure Act*.

Rules 86 and 89 add these pleading requirements:

86. An application for an interim order under section 92.1 of the Act must include:

- (a) one or more declarations signed by persons with first-hand knowledge, detailing all of the facts upon which the applicant relies, including what harm, if any, will occur if the interim order is not granted. Each signed declaration must include the following statement: "This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy"; and
- (b) complete written representations in support of the applicant's position.

* * *

89. A responding party must file a response to the application not later than two (2) days after the application was delivered. A completed response must also include:

- (a) one or more declarations signed by persons with first-hand knowledge, detailing all of the facts upon which the responding party relies, including what harm, if any, will occur if the interim order is granted. Each signed declaration must include the following statement: "This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy"; and
- (b) complete written representations in support of its position.

It will be noted that the language of section 92.1 is exceptionally broad, permitting the Board to respond flexibly to the problems before it in a manner that may be somewhat different from the remedial exercise undertaken at the end of a case (although, no doubt, "interim" and "final" orders should be congruent). The concluding words of section 92.1 reinforce this "facilitative" or "forensic" thrust.

7. In accordance with the Rules, this application for interim relief and the employer's response, were both supported by declarations from persons purporting to have first-hand knowledge of the facts that the parties relied upon. There were declarations from: Brando Paris, a staff organizer for the United Steelworkers of America, Heath Sweetman and Rod Cake, the two employees who had been discharged, and Brian McBain, the Vice President and General Manager of the responding company.

8. The salient features of these declarations will be set out below. At this point, we need only note that certain facts were not disputed, others were disputed or qualified, and despite the Rules, the material from both parties contained elements of hearsay, opinion, or speculation. However, that is probably inevitable where motivation is in issue, where the Board is being asked to assess the potential consequences of alleged misconduct, and where the litigation itself crystallizes so quickly. For present purposes, we simply note that we have had to take these evidentiary difficulties into account in reaching our conclusion.

9. After reviewing the material filed and the parties' representations, the Board made the following determination dated March 2, 1993:

1. The Board hereby directs that Tate Andale Canada Inc. forthwith reinstate Heath Sweetman and Rod Cake, on an interim basis, pending the final disposition of their unfair labour practice discharge complaint in Board File 3437-92-U.
2. The Board further directs Tate Andale Canada Inc. to post the notice attached as Appendix "A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings. The company is also directed to provide a copy of this notice to all employees affected by the union's certification application, Board File 3402-92-R.
3. Formal reasons for these decisions and directions will issue in due course.

* * *

Appendix "A"

Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a hearing in which both the company and the union had the opportunity to make submissions.

The Board has ordered Tate Andale Canada Inc. to reinstate Heath Sweetman and Rod Cake on an interim basis until the Board considers the reason for their discharge. A hearing before the Board is scheduled to begin on March 11, 1993. The purpose of that hearing is to determine why Heath Sweetman and Rod Cake were discharged.

If the Board ultimately determines that Heath Sweetman and Rod Cake were discharged for misconduct or poor work performance, and their support for the union had nothing to do with it, the temporary reinstatement order will be revoked, and the company will no longer be required to employ them.

If the Board ultimately finds that their discharge occurred because they were union supporters, exercising their rights under the *Labour Relations Act*, the Board may confirm their reinstatement, and direct that they be compensated for all earnings and benefits lost as a result of their discharge.

Employees in Ontario have these rights which are protected by law:

AN EMPLOYEE HAS THE RIGHT to join a trade union of his or her own choice and to participate in its lawful activities.

AN EMPLOYEE HAS THE RIGHT to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.

AN EMPLOYEE HAS THE RIGHT to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.

AN EMPLOYEE HAS THE RIGHT not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act*.

AN EMPLOYEE HAS THE RIGHT not to be penalized because he or she participated in a proceeding under the *Labour Relations Act*.

AN EMPLOYEE HAS THE RIGHT to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act*.

Tate Andale Canada Inc.

Per: _____
(Authorized Representative)

10. The Board advised the parties that formal reasons for its decision would be issued later.
11. Those reasons are set out below.
12. It will be convenient to sketch in an outline of the dispute, then turn to the considerations that prompted the Board to make this particular interim order.

II - THE FACTS

13. The company operates a business in Concord, Ontario where it manufactures stainless steel filter screens for customers in the chemical industry. The grievor Rod Cake was hired by the company on January 28, 1991. The grievor Heath Sweetman was hired on July 2, 1991. Both employees worked as welders.
14. The grievors were instrumental in initiating a union organizing campaign. Both grievors were discharged, unexpectedly, in the midst of that organizing campaign.
15. Heath Sweetman was fired on Monday, February 15, 1993. Rod Cake was fired the following morning. Both employees were terminated without notice. Both employees were fired at the beginning of a work week, and a couple of days into the relevant pay period. Cake received no "severance pay". Sweetman was given two weeks pay in lieu of notice.
16. The grievors stipulate that the union's organizing campaign began in the first week of

February, and that they both played an active role, promoting the benefits of trade union representation, and urging their fellow workers to sign union membership cards. Cake describes himself as an “advance man” for Sweetman: if a fellow employee was receptive to Cake’s “sales pitch” s/he was directed to Sweetman, who actually collected the employee’s card.

17. Between February 2 and February 14, both grievors were involved in these organizing activities, and Sweetman collected membership cards at work whenever he could. Until his discharge, Sweetman was the one who collected all of the cards from union supporters. Cake’s role was to help “drum up” employee support for collective bargaining.

18. After Sweetman’s discharge, one employee approached Cake to correct and return a card that he had been given earlier. In this respect, Cake was more than “an advancement man”. He was Sweetman’s alternate, and was so regarded by the employee, who approached Cake unilaterally.

19. Sweetman stipulates that after he was discharged he continued to try to organize support for the union, however:

Many employees told me they were frightened. By February 16, 1993 another supporter, and the only other inside organizer, Rod Cake, had also been fired. People I approached told me they were worried that they would be fired if the company found out they had signed a card. I believe some people did not sign cards because of this fear. In fact, some employees who had been uncertain before February 15, 1993 had definitely decided not to sign after I was fired. I think the fact that Cake and I had been fired influenced their decision.

20. There is no other evidence concerning the “momentum” of the campaign. All that can be said, therefore, is that prior to their discharge, Sweetman and Cake had some success in persuading employees to sign union membership cards, but after they were discharged they had no success at all.

21. The company’s position is that it had no knowledge of the grievors’ trade union activities, and that those activities had nothing to do with their termination. Brian McBain declares that Sweetman’s discharge was the result of poor work performance, which Sweetman had been warned about in the past. McBain maintains that a reasonable employee should have known that his job was in jeopardy - although there is no stipulation that Sweetman was actually told that it was.

22. McBain declares that Cake was discharged because he had taken a fan from the company premises about a month before. He had been told to return it, and had not yet done so. McBain states that he decided to treat the incident as “theft”, because the fan had not been returned within a reasonable period of time.

23. There is no dispute about the way in which the two employees were terminated.

24. Sweetman declares that on February 15, 1993 he was unexpectedly summoned to the office of Brian Boucher, the shop foreman. He was told that he was being discharged, and handed a letter of termination. When Sweetman asked why he was being fired, Boucher replied that the company was not required to give any reason.

25. Sweetman maintains that he has not previously been disciplined for any reason, that his work record has been satisfactory, and that his performance has been consistent with company standards. He has been laid off twice for lack of work, yet on both occasions, he has been recalled to active employment. We are asked to conclude that his work could not have been totally unsatisfactory, or he would not have been re-hired, twice. His recent discharge is portrayed as an unfore-

seen event for which there was no prior warning, and which, of course, resulted in his immediate removal from the workplace (albeit with two weeks' pay in lieu of notice).

26. Cake stipulates that the "fan incident" began when he removed the device from the garbage in mid-January, believing it to be surplus. From his perspective, the matter had been satisfactorily resolved through discussions with management weeks before. The removal of a discarded piece of equipment was not then regarded as "theft", and he had undertaken to return the device as requested. No one at the time demanded that it be returned immediately. No one at the time indicated that there was any urgency about it, or warned of disciplinary action. Cake stipulates:

On February 16, 1993 at 8:00 a.m., the day after Sweetman was fired, Boucher [the shop foreman] approached me and asked me if I had returned the fan. I apologised and told him that I had not returned it yet. I told him I had forgotten to bring it in but that I would bring it in the next day. He said "No". Nothing more. I said I would go home right now and get it. He said "No" again. Nothing more. He walked away.

Approximately fifteen minutes later Boucher approached me and said "Read this". He handed me an envelope. I read the letter inside [the termination letter].

After I read [the termination letter], Boucher told me to pack up my tools and leave. I went home and picked up the fan and returned it to Boucher....

As in Sweetman's case, the termination was totally unexpected.

27. There is no declaration from Boucher.

28. The grievors submit that they have openly undertaken a leadership role in the union's organizing campaign, and that their fellow employees know that they have taken on this responsibility (as illustrated by the employee's approach to Cake when Sweetman was not available). Those fellow employees know that the grievors are persons whom they can trust, and to whom they can speak about the union, in confidence, whether or not the employees have previously signed membership cards. The grievors stipulate that this kind of regular contact is impeded now that they are no longer in the workplace.

29. Brando Paris, the "outside" union organizer, is a full-time employee of the union. Mr. Paris is responsible for this particular organizing campaign. He declares that, in his extensive experience, "inside" organizers like the grievors - who are known and trusted by other rank and file employees - are essential to develop and maintain support for collective bargaining.

30. According to Mr. Paris, the "inside" organizer is the vital link between the union and its supporters or potential supporters. Their presence in the workplace is essential if employees are to effectively pursue their right to join a trade union and seek its "certification" as their bargaining agent. Conversely, the sudden removal of such individuals from the workplace has a chilling effect on the organizing campaign, because employees are likely to be fearful that their jobs will be in jeopardy if they have any further contact with the union or its supporters. Mr. Paris states that that is what has happened here.

31. Mr. McBain disputes the assertions in the preceding two paragraphs; however, as noted, he maintains that the company had no knowledge of, or involvement with, either the organizing campaign or the grievors' support for the union. He does point out that Brando Paris has never been employed by the company, nor to his knowledge has Paris been on company premises. Mr. McBain also expresses a concern (based on double hearsay) that an employee may have been pressured to sign a union card.

32. Despite Rule 89(a), the company did not stipulate any particular harm or adverse consequences which would flow from the interim reinstatement of the aggrieved employees until the propriety of their discharge was litigated (i.e., a few weeks). It is implicit that the grievors' work performance might be no better than it was during the period of their employ; however, there is no indication of any serious problems in this regard. Nor did the company identify any administrative difficulties or economic risk associated with reinstating the two grievors to their former positions for this relatively short period of time.

33. Sweetman's declaration mentions an accident which occurred some weeks before his termination, but nothing much was made of it at the time, and Sweetman was not disciplined in any way, or warned that his job was in jeopardy. Nor did McBain make much of it in his declaration, or suggest that there was any likelihood of anything similar happening again (i.e., that if Sweetman was returned to his regular job for another few weeks there was a tangible risk of property damage or economic loss). Indeed, in Sweetman's case, the period of provisional reinstatement would overlap with the period for which Sweetman had already been paid without any reciprocal obligation to work. The company gave Sweetman "termination pay" in accordance with the *Employment Standards Act*. It did not take the position that he was disentitled because of "wilful misconduct or neglect of duty".

34. The alleged, "erosion of the company's management rights" was raised in argument, and will be addressed below.

35. An application for certification associated with this organizing campaign was filed on February 19 and scheduled to come on for hearing, in the ordinary course, before another panel of the Board. There was no indication that the union in that application was relying on section 9.2 of the Act. The focus of the application for interim relief was the return of the aggrieved employees to the workplace.

III

36. Since this is one of the first cases to arise under section 92.1 (which came into force on January 1, 1993), it is neither practical nor prudent to attempt any definitive interpretation of its scope. Obviously, the Board has been given a new and broad discretion in any "proceeding or intended proceeding", to fashion such "interim order" including interim relief as it considers appropriate, on such terms as it considers appropriate". However, at this stage, it is probably unwise to make any panoramic pronouncements. As in other statutory areas, the Board's approach to section 92.1 will evolve in accordance with accumulating experience.

37. Nevertheless, we think it is fair to conclude that section 92.1 was intended to be an addition to the Board's remedial arsenal. It was intended to supplement the Board's existing labour relations "remedies" available at the end of a case, so that what the Board must now do, is square its new powers with the established legal framework. Moreover, interim relief is clearly derivative. It does not stand alone. It draws its essence, and must be tailored, to the particular mix of facts in each case, as well as the public and private interests at play in the main application. The main application sets the framework for consideration of the particular facts under review, and the particular interim "order" or "relief" requested.

38. Since that is the starting point for any interpretation of section 92.1, it may be useful for this case to briefly consider the way in which the Board approaches the litigation and resolution unfair labour practice complaints filed in connection with an organizing campaign.

39. In the first place, we might observe that the Board is not a court; and there is no reason

to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement (see section 110), it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community. (See generally: *Alex Tomko v. Labour Relations Board of Nova Scotia, et al* (1975) 76 CLLC ¶14005 (per Laskin, C.J.C.).)

40. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220, the Board outlined some of the considerations underlying the exercise of its remedial authority: what it should consider, and what it should do when it has found a breach of the Act. This is what the Board said:

93. It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labour Board Remedies* (1968), 14 Wayne L. Rev. 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section 79 [now 91] have emerged.

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94. If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating *The Labour Relations Act*. But the Legislature did not provide the Board with this role and probably with good reason. See *Little Bos. (Weston) Limited* [1975] OLRB Rep. Jan. 83, at 91. Section 85 [now 98] of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 5, 423(2)(a); *Re Regina v. Gralewicz et al* (1979), 45 C.C.C. (2d) 188 (Ont. C.A.). By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. If it were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution

of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than “two-fisted” enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court’s contempt jurisdiction.

95. In the immediate case this principle has importance. For example, affirmative orders that an employer post notices indicating that he has violated the Act and directives that he publicly commit himself to future compliance with the legislation cannot have as their purpose public humiliation, embarrassment and, thereby, punishment. These remedies may be appropriate, as might direct trade union access both to employees on an employer’s time and to employee addresses, but only as directives aimed at the removal or rectification (to use the language of the statute) of the consequences of a violation. These types of remedies, and their nature is almost infinite, should have as their purpose the amelioration of the lingering psychic effects of unfair labour practices and the consequent injury to a union’s organizational or bargaining strength. The jurisprudence developed by the National Labour Relations Board is replete with other examples and demonstrates the great potential for developing affirmative labour relations remedies under Section 79. See McDowell and Huhn, *NLRB Remedies for Unfair Labour Practices*, Wharton School of Finance, Univ. of Pa. (1976). However, the Board must consider the appropriateness of each remedy in a Canadian context and in the light of our own statutory framework. For example, *square* the application of certification extension in Ontario: *Mar-Jac Poultry* (1962) 136 NLRB 785.

On judicial review, the Divisional Court observed:

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself; then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

41. In our opinion, these “remedial” considerations traditionally reviewed at the end of the case should inform the way in which the Board approaches interim orders or “relief”. In both instances, the *Board* is required to blend and balance statutory imperatives, policy considerations, and the realities of contemporary labour relations.

42. Where interim relief is sought in connection with an unfair labour practice complaint, one must keep in mind the legal rights and administrative processes that the law is intended to protect; or to put the matter another way, the rights and processes which the impugned conduct may (and may be intended to) undermine. In the context of a union organizing campaign, those rights include not only an individual right to choose without fear of reprisal, but also a correlative group right of self-organization, so that employees may establish a collective bargaining relationship in the manner contemplated by the statute. A remedial philosophy that focuses exclusively on repairing the harm to individual victims, and neglects the general assault on freedom of association, will inevitably fail to promote the statutory objective.

43. If the employer’s purpose were only to punish the individual worker for supporting the union, the law might well redress the harm by restoring him/her to the job, and making up the income that s/he has lost. But if the real objective is to break the momentum of the organizing campaign, to eliminate an influential employee advocate, or to send a graphic message to other employees, the set-back to the employees’ quest for a collective voice in the workplace may not be so readily remedied.

44. It is not easy to calculate the value of the employees’ “lost opportunity” to make a fair and free choice about trade union representation. It is not easy to repair an administrative process that depends for its efficacy on the free exercise of employee wishes. It is not easy to assess the

value of lost leadership in the formative stages of an organization - although it is perhaps self-evident that a voluntary organization, be it a club, church or trade union, depends upon the zeal and commitment of its core members. However intangible these qualities of energy or commitment may be, a voluntary organization like a trade union cannot form or function without them - particularly in its early stages when workers may be unfamiliar with their rights, when the statutory freeze or "just cause protection" may not yet have been triggered (see sections 81 and 81.2 of the Act) and employers may be more inclined to resist unionization, legally or illegally. For it is a sad fact of the industrial relations scene that almost fifty years after the employees' right to collective bargaining was entrenched in law, some employers continue to resist the exercise of those rights, or penalize employees who dare to do so. That is why section 111 of the Act preserves the anonymity of union supporters, lest their identification expose them to employer reprisals. If the Legislature had been confident that employees had nothing to fear, or Board remedies were a complete answer to illegality, it would not have shrouded the organizing process with such secrecy (incidentally reversing, by statute, the decision of the Supreme Court of Canada in *Globe Printing Co.* [1953] 3 DLR 561).

45. A remedial approach that does not take into account these labour relations realities will necessarily be deficient, and to that extent ineffective, as either redress or deterrent.

46. Where the Board concludes that a breach of the Act has occurred, it is required to construct a remedy that is sensitive to these concerns and, insofar as possible, rectifies the labour relations status quo disrupted by the illegal act. Where the Board is called upon to grant interim relief in a "pending or intended proceeding", it must consider whether an affirmative order is necessary either to neutralize the potential impact of an alleged unfair labour practice, or to enhance the Board's ability to address the labour relations situation, whether or not an unfair labour practice has occurred.

47. It must be recognized that early intervention, stressing immediacy rather than severity, can have a powerful preventive effect and reduce the necessity for later more intrusive action. Whatever balance may commend itself in particular cases, self ordering is preferable to Board intervention, and an early, moderate response may encourage accommodation and may be preferable to a later, more intrusive one. It is in no one's interest to encourage layers of litigation. If timely interim relief offsets the potential advantage of illegal action, discourages such action, promotes settlement or reduces the likelihood of further litigation, such results are all completely consistent with the statutory objective.

48. It is essential that Board orders - interim or final - be sensitive to the realities of the workplace; and one such reality is the employee's ignorance of the law. One cannot realistically expect rank and file employees to be familiar with their rights under the *Labour Relations Act*. But one can be sensitive to their fears, and responsive to the concern that the law may favour those with economic power or the ability to act unilaterally. Accordingly, quite apart from the relief available to aggrieved individuals, there may be an independent value in an order that reassures other workers that the law stands above the fray, and proclaims that the legal result will rest on statutory principles, not the personality or relative power of the participants. In our system of industrial relations there is ample scope for the exercise of economic power, but it is not, and cannot be, the basis for resolving statutory rights.

49. As the Board noted in *Radio Shack*, and we here repeat: a remedial order (be it interim or final) can, and often should, include an informational component - not least because the discharge of union supporters in the midst of an organizing campaign may have an adverse impact regardless of the propriety of such discharge. An employer's actions may inhibit the exercise of

employee rights, whether or not it intends to do so; and may undermine the mechanism for testing employee wishes, whether or not there is ultimately a finding of illegality. Again, timely intervention, without finding of fault, may be the most appropriate course in such circumstances, in order to promote the statutory policy, and protect the established administrative processes.

IV

50. On a motion for interim relief, it is neither necessary nor desirable for the Board to make any determination of the merits of the underlying application (here an unfair labour practice complaint with a certification application in the wings). The Act and Rules both contemplate a summary process, based upon written material, where there may not even be a formal hearing (see section 104(14) and Rules 92 and 93). Within that framework, it is neither fair nor feasible to try to resolve disputed facts or explore the nuances of the law. That is best left to the hearing “on the merits”, where the Board will have to hear directly from witnesses whose credibility could be an issue, and the parties will have more flexibility to develop their case in their own way.

51. Of course, under section 92.1, the Board will have to take into account the kind of case it has before it, what we have described as the “contours” of the case (including disputed facts), and the likely disposition should one party or the other be successful. But, on an application for interim relief the focus is on preserving rights pending the hearing on the merits, rather than a meticulous assessment of the relative strength of each party’s case. Accordingly, a party may be entitled to an interim order or interim relief if the material filed establishes an “arguable” or *prima facie* case for the ultimate relief requested.

52. In the instant case, there is not much doubt that the applicant meets that threshold. Where the union’s two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a *prima facie* case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred; moreover, in cases of this kind, where the employer bears the legal onus of establishing that it has not contravened the Act, it is hardly surprising that the union requests that the “pre-discharge” status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was not unlawful, there is nothing counter-intuitive about keeping them there until it does so. However, quite apart from the question of legal onus or the strength of the union’s case, we are satisfied from the material before the Board that there really are reasonable grounds for the employees to believe that Cake and Sweetman were discharged because of their trade union activities (whether they were or not); and that that situation is likely to persist unless the Board intervenes, and until the employer establishes that these terminations were not in fact tainted by any anti-union motivation.

53. In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union. And that, in fact, was Sweetman’s experience when he approached individuals who had previously expressed some interest in collective bargaining. Thus, whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees’ rights are resolved through impartial adjudication.

54. The question, though, is whether some interim direction is appropriate to address these concerns, and, if so, what form it should take.

55. In answering that question, we do not think it is very helpful to consider what a Court might do on an application for an interim injunction. For the reasons already outlined, we see no reason to import common/civil law considerations into the interpretation or administration of the *Labour Relations Act* (i.e., the Rules of Equity, undertakings as to damages, etc. - again, see the comments of Laskin, C.J.C. in *Tomko*, *supra*). On the other hand, we do think it is necessary to consider what "harm" may occur if an interim order is not granted, and what "harm" may occur if it is granted; moreover, that assessment should be made from a labour relations perspective, having regard to the scheme and purpose of the Act, of which section 92.1 is a part. In our view, the interests to be considered include those of the employer, the union, the aggrieved employees, and other employees in the workplace who may be effected by the conduct under review. However, we also think we should consider what may be described as a "general" or "public" interest in ensuring that the statutory objective is achieved, insofar as possible, in accordance with the administrative process prescribed, without protracted litigation. To the extent that the early intervention can have a moderating or prophylactic effect, that course is to be considered.

56. What is the "harm" potentially suffered by the union, the employees, and the process, if interim relief is not granted - that is, if the Board does not reinstate the grievors, or otherwise take steps to restore the labour relations status quo prevailing at the time of their discharge? Least significant, we think, is the potential wage loss to the aggrieved employees, which is fully recoverable (if they are successful) within a few weeks, and, in Sweetman's case, is moderated by the fact that he has already received some severance pay. More important, in our view, is the likely impact on other employees, who may have had an appetite for collective bargaining, but have just seen the union's two principal proponents summarily removed from the workplace in the midst of the organizing campaign. This is not a neutral event, and it would be totally unrealistic to expect employees to regard it that way.

57. It is one thing for lawyers to be confident in the efficacy of the legal process to vindicate statutory rights. It is quite another to expect employees to have such confidence, or to still the nagging suspicion that relative economic power might influence the result. Nor is this idle speculation, for even among sophisticated labour law practitioners there is an ongoing debate about the utility of Board remedies, and since the early 1970's the Statute has been amended on several occasions to broaden the remedial options - suggesting, we think, some Legislative doubts about the effectiveness of what was there before. And unless the Board does so, there may be no authoritative voice to reassure employees of their statutory right to join a union, or not, free from improper interference.

58. For most employees, the law is an unfamiliar, even alien abstraction. The reality is the employer's economic power and the "right" (or at least opportunity) to move unilaterally to deprive them of their livelihood. Accordingly, the most effective way to counteract the "message" of a summary discharge is an equally speedy reinstatement - *accompanied by formal notification to employees of the terms and limits of such temporary reinstatement, as well as a summary of their statutory rights*, in order (to use the words of the panel in *Radio shack*) to "take account of the economics and psychology permeating the situation at issue". Indeed, in the context of an organizing campaign, where the certification application has not yet been disposed of, that Board response is particularly attractive, unless there are compelling employer interests that point in some other direction. During this sensitive period, labour relations realities commend this prophylactic approach.

59. If the Board is engaged in a process of weighing relative "harm", what harm does the employer articulate as flowing from a temporary restoration of the pre-discharge status quo? An

interim order is not a neutral event from the employer's perspective either. But what is the potential adverse impact in the particular circumstances of this case?

60. Nothing in the material filed by the company establishes any real risk of economic loss, or even major inconvenience if Sweetman and Cake are reinstated to their former positions, for the short period that it would take to litigate their discharges. In neither case do the purported reasons for discharge involve any serious compromise of business interests, and in Sweetman's case, he has already been paid for a portion of the time during which his temporary reinstatement would obtain. An employee whom the employer itself has regularly rehired does not pose any serious harm of reinstatement for a few weeks.

61. In Cake's case, assuming that the "fan incident" could be characterized as "theft", it is hardly likely to be repeated, nor would Cake's interim reinstatement likely provoke a plague of petty pilfering by other employees. There is no indication that this has been a problem in the past, or that dishonesty is contagious, or that Cake's temporary reinstatement would encourage theft or be viewed as Board condonation of employee misconduct. To the extent that such impression might arise, it can be adequately addressed by a notice to employees, explaining their rights and obligations, as well as the limitations of the Board's temporary order. Such notice can clearly indicate that the law does not protect employees from the consequences of their own misconduct - if that is indeed the reason why they have been discharged. At the same time, the notice can reassure employees that poor performance or alleged misbehaviour cannot be used as a pretext for interfering with statutory rights.

62. No doubt if the Board were to restore the two grievors to their former positions, they would have to work and the company would have to pay them for a short period of time. But to characterize this as serious harm is, in our opinion, entirely misplaced. The company will receive the benefit of the employees' labour in the interim, just as it did before - and, on the facts of this case, without much prior complaint.

63. This is to not to say that participation in union activity conveys a cloak of immunity permitting workers to engage in conduct disruptive to the ongoing operation of the business. But in this case, it is a little difficult to see what real harm the company will suffer if Cake and Sweetman are reinstated for the period it takes to test the purported reasons for their termination. Nor does this interim resolution (i.e., reinstatement of the pre-discharge status quo) appear incongruous in a statutory regime where the legal onus rests on the employer to establish the validity of these terminations.

64. The reinstatement of the aggrieved employees may well interfere with what the company describes as its "management rights". But in the context of an unfair labour practice proceeding, that phrase has little analytical content; for what is really at issue is the existence, basis or extent of such "management rights" (here to unilaterally dispose of employees), in light of the statutory rights and processes set out in the *Labour Relations Act*.

65. No one doubts the employer's right, more or less, to deal with its property and run its business as it sees fit; nor does this panel question the value of entrepreneurial initiative, business flexibility, and so on. That, too, is part of the "economics and psychology permeating the situation at issue" mentioned by the Board in *Radio Shack*. But whatever the content of these "management's rights", they must be exercised within a framework of law which here contemplates a weighing of relative harm; and if financial, economic, or organizational interests are to be weighed in the balance, they must be identified and substantiated.

66. The company has not done so here; and to the extent that its symbolic authority may be

temporarily eroded, that too can be addressed in a notice, which explains to employees that if Cake and Sweetman were not in fact discharged for exercising statutory rights, their discharge - and the employer's managerial authority - will be sustained.

67. In all the circumstances of this case, the Board was persuaded that employees Cake and Sweetman should be temporarily reinstated pending the disposition of their unfair labour practice complaint, and that there should be a notice to employees in the terms set out above.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; October 13, 1993

1. I could not conceive of a democratic society not guaranteeing freedom of association in the fullest sense of that word provided only that the purposes of such association are lawful. Association for purposes of bargaining collectively is lawful. Ancillary purposes such as protecting against, or seeking redress for, arbitrary action in breach of an agreement are similarly lawful.

2. The recently legislated "interim relief" provisions, within which this application is framed, are apparently intended to reinforce the existing guarantee that individuals are free to join a trade union and participate in its lawful activities without fear of penalty. I think the majority are also correct in inferring a further purpose of trying to ensure against parties electing to engage in an activity during the organizing period which may subsequently be found to have been in breach of the Act but, the penalty for which the offending party may view as being worth the price of an advantage, real or imagined, resulting from the activity giving rise to the penalty.

3. In my view, the decision accurately forecasts that under present law employees terminated during an organizing drive will in all likelihood be reinstated, in the absence of a compelling labour relations argument, economic or otherwise, to the contrary, notwithstanding that at some future date the grounds for termination may be upheld by this tribunal or an arbitrator.

4. It would seem to me this further assurance of the protection of an individual's rights to join a trade union provides yet further reason for the Board to have confidence in the secret ballot vote as a means of determining the true wishes of all employees and to rely on such votes with greater frequency it being within the discretionary power of the Board to do so.

5. While I do not associate myself with all of the majority obiter I do agree with the facts as recited and the interpretation of the law resulting in reinstatement of the two employees. Given that the Board has made no findings as to the grounds for termination, and that the reinstatement may ultimately prove to be temporary. I am given to wonder if posted notices such as required in paragraph 9 of the majority decision should not more properly be signed by "the Board" rather than the employer.

3597-92-U Southern Ontario Newspaper Guild, Applicant v. Thomson Newspapers Corporation and The Cambridge Reporter, A Division of Thomson Newspapers Corporation, Responding Party

Strike - Unfair Labour Practice - Union asserting that employer violated Act when it denied bonus payments to striking employees in the years 1991 and 1992 - Board finding that while it may have been permissible for employer to have withheld bonus payments to striking employees under strict terms of "recognition bonus plan", its reasons for doing so were not free of anti-union or prohibited considerations - Employer directed to compensate employees

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. N. Fraser* and *R. R. Montague*.

APPEARANCES: *Kathleen Martin* and *Lorne Slotnick* for the applicant; *Stephen F. Gleave*, *Jim Carnaghan* and *Robert Wesley* for the responding party.

DECISION OF THE BOARD; October 6, 1993

1. This is an application under section 91 of the *Labour Relations Act* by the Southern Ontario Newspaper Guild. The Guild asserts that the responding party, Thomson Newspapers Corporation and The Cambridge Reporter, A Division of Thomson Newspapers Corporation, breached sections 65, 67 and 71 of the Act when it denied bonus payments to striking employees in the years 1991 and 1992. An allegation that the responding party also contravened section 81 of the Act was withdrawn at the start of the hearing.

Facts

2. The Cambridge Reporter is one of a family of newspapers owned by Thomson Newspapers Corporation. The Reporter is published Monday to Saturday and has a circulation of about 13,000 copies. It employs approximately 60 full-time and 30 part-time employees. The Guild represents between 40 and 50 employees in the administration, advertising, circulation and editorial departments. Persons employed in "production" are represented by another bargaining agent.

3. Jim Carnaghan has been the Publisher and General Manager of the Reporter since May 4, 1992. He testified on behalf of the employer about the recognition bonus plan and the way it was administered both before and during his tenure. The plan was introduced in the mid-1970's. It was terminated in 1993 for financial reasons. Although there was some dispute on the evidence as to the precise terms of the plan, the Board is satisfied that they are accurately reflected in a memorandum signed on December 30, 1991 by the former publisher, Jon Butler, which states:

Recognition Bonus Plan Renewed

In extending our policy of recognizing the contributions made by the staff to the successful production of the newspaper, I am pleased to announce that the Recognition Bonus Plan will be renewed for the year of 1992.

The production of The Cambridge Reporter with the constant requirement of meeting daily press deadlines is dependent upon the co-operative effort of each member of the staff.

Each full-time employee who has completed one year of continuous service on December 31, 1992 and who is an active employee of the newspaper at that date, will be eligible to receive a cash Performance Bonus. The bonus will be 4% of basic 12 months' salary or wage based on the rate in effect at January 1, 1992, with a maximum of \$500.00 for the 12-month period. Since the

bonus is dependent upon regular uninterrupted production and delivery of the newspaper, the amount payable to any individual employee will be reduced by 7.5% for each day or portion thereof during which, in the judgement of management, the employee does not perform his/her assigned task in this 12-month period except where the employee:

- is on authorized paid leave of absence (which includes regular vacations and paid holidays), or
- is absent due to injury, covered by Workers' Compensation, or
- is absent due to verified illness, where the reduction in bonus will apply to only the first two days of each absence.

4. Also material is an earlier memorandum, dated January 6, 1991, from Jon Butler to six department heads at the Reporter. This memorandum states:

"The 'Recognition Bonus Plan' has been renewed for 1991 and the attached should be posted in your department.

This 'Bonus Plan' is to be monitored by you, for your employees, and it is imperative that Gerry receive documentation of any illness or late arrival of your staff.

If you feel any employee is not performing his/her task you may also reduce the bonus.

Please submit any reductions on the day of the infraction.

If you have any questions, please ask."

5. Mr. Carnaghan explained that the plan was available to all full-time employees except those that were covered by another plan. The bonus was paid in the year in which it was earned, usually just prior to Christmas. The purpose of the plan was to reward employees for contributions to production. Accordingly, the bonus would be reduced by 7.5 per cent for each day during which, in the judgement of management, the employee did not perform his or her assigned tasks, except in certain circumstances. In the first two circumstances listed in the December 30, 1991 memorandum there would be no reduction. In the third circumstance, that of verified illness, the reduction would be limited to the first two days of absence, for a total possible reduction of 15 per cent for each such illness.

6. Between November 7, 1991 and February 21, 1992 some members of the Guild bargaining unit went on a lawful strike for a first collective agreement. Others continued to work and the paper continued to be published. The striking employees did not receive recognition bonus payments for the years 1991 and 1992. The Guild submits that the employer breached the Act when it refused to pay the bonuses. It was Mr. Carnaghan's evidence that because the strike lasted for more than 13 days in each year and "strikes" did not fall within one of the listed exceptions, the bonuses had been eliminated at the rate of 7.5 per cent per day. Bonuses were received, however, by the members of the Guild bargaining unit who continued to work during the strike.

7. In denying the Guild's allegation that the employer had discriminated against striking employees by denying them bonus payments, Mr. Carnaghan gave examples of situations other than strikes and verified illnesses in which the bonus would be reduced. He cited:

1. lateness affecting production;
2. "mess-ups" that disrupt production;
3. unpaid leaves of absence; and

4. pregnancy leaves.

Mr. Carnaghan acknowledged, however, that an unpaid leave of absence had never been granted at the Reporter. Accordingly, the parties focused considerable attention on pregnancy leave, apparently because this was the only circumstance other than strikes in which the employer had allegedly reduced the bonus payment by 7.5 per cent per day, without interruption, over an extended period of time.

8. Documents were introduced and witnesses were called by both sides to establish that the employer either had or had not denied bonus payments to pregnant employees for the years in which the pregnancy leave was taken. The Board has carefully examined this evidence and sees no need to recite it in detail. Suffice it to say that the "sample group" was limited and the evidence was mixed. While it is true that a 100 per cent reduction appears generally to have been applied, the practice was not uniform. At least one employee suffered no reduction whatsoever.

9. Mr. Carnaghan also directed the Board's attention to an employee by the name of Crawford whose bonus was reduced by 100 per cent in 1992 for having been repeatedly sick and late for work. Crawford was not a member of the Guild bargaining unit.

10. Finally, Mr. Carnaghan gave evidence about the manner in which the bonus cheques were distributed in 1992. The strike had ended on February 21. The cheques were distributed about 10 months later, just prior to Christmas. Mr. Carnaghan said that he handed the bonus cheques to each employee personally, shook the recipient's hand and congratulated them for their efforts. In cross-examination, Mr. Carnaghan acknowledged that the only members of the Guild bargaining unit who had not received a bonus cheque in 1992 were those who had been on strike, and that the strike had created a division in the unit which was taking some considerable time to heal. (At the time of the hearing in this matter a first collective agreement, which the Board directed in its March 26, 1992 decision to be settled by arbitration, had yet to be achieved.) Mr. Carnaghan denied the suggestion, however, that his method of distribution, unique in the history of the Reporter, was intended to "rub the noses of the strikers in what they weren't getting". Rather, Mr. Carnaghan justified his approach as an appropriate way of recognizing the recipients' efforts and pointed out that it was consistent with the practice at the Sarnia paper from which he had recently come.

11. The Guild called three witnesses. Ann Watkins, an accounts payable clerk, gave evidence about a conversation which took place on the picket line in 1991 between herself, another striker and the former publisher, Jon Butler. Ms. Watkins said that the other striker asked Mr. Butler about the status of the "incentive earnings cheques" and Mr. Butler replied, "I think you people screwed yourselves when you went on strike; remember, it's a 7.5 per cent reduction for each day you're out here." Ms. Watkins then said, "No Jon, it's to a maximum of 15 per cent". That was the end of the conversation. Ms. Watkins was surprised by Mr. Butler's statement because this was the first time she had heard of any circumstance in which the recognition bonus payments would be reduced at the rate of 7.5 per cent per day over an extended period.

12. Ms. Watkins also testified that Dave Norris, a reporter at the paper, participated in the strike on the first day but later crossed the picket line and continued to work. Mr. Norris' 1991 bonus was unreduced. Ms. Watkins was uncertain, however, whether Mr. Norris was actually scheduled to work on the day in question.

13. Cathy Miehn was the second union witness. During the period of the strike she was the assistant city editor and a Guild bargaining unit chair. Ms. Miehn described a "sit-in" which took place in mid-April 1992, approximately two months after the strike had ended. Ms. Miehn was fill-

ing in for the city editor at the time. Shortly after 9 a.m. a number of bargaining unit members who had worked during the strike left their desks and congregated in the board room. They were upset with the Guild and refused to leave until they got some answers. As unit chair, Ms. Miehn was asked to speak to the group but she declined, pointing out that she was on deadline and could not discuss union business on company time. Ms. Miehn gave the names of 13 bargaining unit members who participated in the sit-in, her understanding as to their scheduled hours of work and her observations as to whether they actually worked that day. Based on Ms. Miehn's evidence and a review of the employer's records, the Board is satisfied that the individuals she identified failed to perform their assigned tasks for a substantial part of the working day. Although deductions were made from the employees' wages, their bonus payments were unreduced. Ms. Miehn also gave evidence that, as a reporter, Mr. Norris' days and hours of work would normally have included the first day of the strike when she too observed him on the picket line.

14. The final union witness was Mark Stewart. Mr. Stewart is a reporter at another Thomson paper, the Oshawa Times. He testified that the plan in effect at the Reporter was also available at the Times. He said that his bonus was not reduced in 1992 when he was off on union business for five days. However, Mr. Stewart acknowledged that a collective agreement is in place at the Times which contains provisions dealing with the performance of union business on company time.

Submissions

15. Section 65, 67 and 71 of the Act provide:

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

16. The employer submits that there is no evidence of a breach of the foregoing provisions of the Act. It says that it was simply applying a policy that had been in place at the Reporter for a

number of years and which provided for a reduction in bonus payments at the rate of 7.5 per cent per day for any day during which an employee did not contribute to the production of the paper. The employer argues that, under the terms of the plan, the "character" of an absence was not material, unless it fell within a defined exception. In all other circumstances, it was the fact of the absence and not the reason for it that was determinative. The employer draws an analogy to certain arbitral decisions which have held that "deemed termination" clauses in collective agreements do not offend human rights' prohibitions against discrimination on the basis of disability because they involve the application of a neutral criterion to specific facts. It was the neutral requirement of being at work and contributing to the production of the paper that led to the denial of the bonus payments in this case and not the fact that the employees' absences were because of a strike.

17. The employer also argues that there is no evidence of any "penalty" having been imposed within the meaning of section 67(c) of the Act because the denial of the bonus payments was not accompanied by any threats or intimidating conduct. There is also nothing in the evidence to suggest that the reduction or threat of reduction deterred anyone from exercising any rights under the Act. Indeed Ms. Watkin's evidence is to the contrary. Just as employees knew and understood that they would not receive wages and benefits while on strike, so also, the employer submits, employees knew and understood that they would not receive bonus payments tied to production.

18. The company relies on the following authorities: *Tim Reay*, [1982] OLRB Rep. Aug. 1206; *Hayloft Steakhouse Limited*, [1987] OLRB Rep. May 717; *Canada Packers Inc.*, unreported arbitral decision dated August 11, 1992 (Solomatenko); *Etobicoke General Hospital*, unreported arbitral decision dated April 3, 1992 (Craven).

19. The Guild submits that the crux of the complaint is discrimination on the basis of the exercise of the right to strike and reminds the Board that the onus is on the employer to establish that the decision to deny striking employees recognition bonus payments in the years 1991 and 1992 was not motivated, in whole or in part, by anti-union considerations.

20. According to the union, Mr. Carnaghan's explanation for the denial of the recognition bonus payments does not measure up against the evidence of the mixed treatment of pregnant employees, the failure to withhold any bonus payments to employees who participated in the sit-in or to Dave Norris, the practice at the Oshawa Times, and the employer's prior conduct as recorded in *The Cambridge Reporter*, [1992] OLRB Rep. March 271. The Guild submits that there was no other circumstance in which the employer uniformly reduced employees' bonus payments by 7.5 per cent per day over an extended period, and that this is evidence of discrimination on the basis of the right to strike.

21. With respect to section 67(c), the Guild adds that it need not establish that employees actually returned to work because of the employer's punitive conduct. The imposition of a monetary penalty is sufficient to establish a breach. Finally, the Guild asserts that the impact of the employer's discriminatory conduct on the employees' right to strike was so predictably harmful that it ought to be presumed to have intended those consequences.

22. The Guild relies on the following authorities: *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745; *Re Cadillac Fairview Corp. Ltd. et al and Retail, Wholesale and Department Store Union et al* (1989), 71 O.R. (2d) 206 (C.A.); *Kodak Canada Ltd.* (1975), 10 L.A.C. (2d) 332 (Betcherman); *Air Alliance Inc.* (1991), 15 CLRBR (2d) 288 (C.L.R.B.).

Decision

23. The central issue in this case is whether the employer discriminated against employees contrary to the Act by denying them recognition bonus payments in the years 1991 and 1992.

24. The essence of “discrimination” is differential treatment between groups or individuals without reasonable justification and with adverse consequences. There is no question that the striking employees were treated differently from the “non-strikers”, with adverse consequences, in respect of the bonuses. The non-strikers received recognition bonus payments and the strikers did not. The issue, however, is whether there was reasonable justification for their treatment or, more accurately, whether the differential treatment was because of the exercise by employees of their right to strike? This issue is obscured, but not eliminated, by the fact that recognition bonus payments, as a form of compensation, resemble wages. Unlike wages, however, recognition bonus payments are discretionary, and it is the exercise of the employer’s discretion that is central to this case.

25. A review of the terms of the recognition bonus plan reveals that the employer reserved to itself a wide measure of discretion in determining the circumstances in which recognition bonus payments could be made or withheld. The object of the plan, as stated by Mr. Carnaghan and reflected in the documents, was to encourage employees to contribute to the “regular uninterrupted production and delivery of the newspaper”. Subject to three exceptions, the bonus would be reduced at the rate of “... 7.5 per cent for each day or portion thereof during which, in the judgement of management, the employee [did] not perform his/her associated task...”. Strictly as a matter of interpretation, therefore, the employer’s conduct may well have fallen within the ambit of its discretion. The issue before the Board, however, is whether that discretion was exercised in a manner calculated, in whole or in part, to discriminate against employees because of their exercise of the right to strike. This issue can only be determined based upon a review of the evidence as a whole.

26. The Board derives little assistance from the employer’s treatment of pregnancy leave. The absence of a uniform practice by the employer in this area does not lead us to conclude that strikers were improperly singled out in the denial of 100 per cent of their recognition bonus payments. Rather, this evidence merely confirms our view as to the breadth of the discretion retained and exercised by the employer under the terms of the plan.

27. Much more troubling, however, is the evidence with respect to the sit-in. Less than two months after the conclusion of a bitter strike and after the Board’s direction of a first collective agreement by arbitration, employees who had crossed the picket lines and continued to work during the strike withdrew their labour for a substantial part of a working day. In the absence of any evidence to the contrary, and given the acknowledged divisions in the workplace, the Board accepts Ms. Miehn’s evidence that at least one of the purposes of the sit-in was to express dissatisfaction with the union and to attempt to convey the message that the Guild did not truly “represent” all of the employees in the bargaining unit.

28. When it came time to dispense the recognition bonus payments, however, these employees, unlike the strikers, were unaffected by their earlier work refusals. Their bonus payments were unreduced. Seeking to explain this differential treatment, the employer states that, unlike the strike, the sit-in had no real impact on production because deadlines were met and the paper went out on time. It is suggested, therefore, that it was consistent with the terms of the plan for these employees to have suffered no reduction.

29. This explanation is not supported by the evidence. As noted above, the bonus is said to

be dependent upon “regular uninterrupted production and delivery of the newspaper”. However, reductions are to be made for the non-performance of assigned tasks. There is nothing to suggest that the latter must cause the former. Indeed, the evidence is to the contrary. The January 6, 1991 memorandum makes no mention of any failure to meet deadlines or whether the paper actually goes out on time. It suggests, if it does not also make explicit, that any illness, late arrival or non-performance of an assigned task is grounds for a reduction. There is also nothing in the evidence to suggest that Crawford’s latenesses or the taking of pregnancy leaves had the effect relied upon by the employer. Further, and in any event, we note that the paper continued to be published throughout the strike.

30. To similar effect is the evidence with respect to Dave Norris. The Board is satisfied, on a balance of probabilities, that Dave Norris participated in the strike on its first day when he was properly scheduled to work, but later returned to work for the duration of the strike. He too suffered no reduction in bonus arising out of his earlier work refusal.

31. What we are left with then is the fact that the employer accorded more favourable treatment to those who had crossed the picket lines or otherwise acted in opposition to the union (through the sit-in) than to the strikers in the payment of bonuses. While we recognize that there is a significant difference between a three and one half month withdrawal of labour and one which only lasted for one day or a substantial portion of a day, it is a difference in degree and not in kind. It is not sufficient to rebut the inference we draw from the evidence that the differential treatment was the product of the employer’s view of the employees’ exercise of their statutory rights.

32. Accordingly, on the basis of the evidence the Board is satisfied that the employer discriminated against employees contrary to section 67(a) of the Act when it withheld recognition bonus payments to the striking employees in the years 1991 and 1992. In coming to this conclusion, the Board has not placed any weight on the evidence with respect to the practice at the Oshawa Times. Although the Times is a member of the Thomson group, it is a separate employer operating in a different collective bargaining context. Similarly, the Board found nothing in its decision in *The Cambridge Reporter*, *supra*, to assist in the resolution of the issues in this case.

33. With respect to the evidence of the method of cheque distribution in 1992, the Board notes that while there is nothing wrong and perhaps much to commend Mr. Carnaghan’s approach in normal times, both the times and the approach were not normal. Given the acknowledged divisions in the workplace, the approach adopted by Mr. Carnaghan suggests that there may have been more behind the employer’s decision than it was prepared to admit. Given our findings on the balance of the evidence, however, we need make no determination on this point.

34. Finally, we wish to make clear that we neither find, nor suggest, that employers must make incentive bonus payments to striking employees. That was not the issue here. The issue was one of discretion and the way in which that discretion was administered in the circumstances. We have found that while it may have been permissible for the employer to have withheld the bonus payments to the striking employees under the strict terms of the plan, its reasons for doing so were not free of anti-union or prohibited considerations.

35. Accordingly, the Board hereby directs the responding party to compensate employees forthwith for the amounts they would have received had they not been on strike during the relevant periods, together with interest. The Board will remain seized to resolve any disputes as to compensation.

3116-92-R Retail, Wholesale and Department Store Union AFL-CIO-CLC and its Local 1000, Applicant v. The Hudson's Bay Company, Responding Party

Combination of Bargaining Units - Bargaining Unit - Union seeking to combine seven department store bargaining units in southern Ontario - Board considering and applying decision in *Mississauga Hydro* - Shift in union bargaining power flowing from combination order not the kind of serious labour relations problem contemplated by section 7(3) of the *Act* - Board concluding that combining units would reduce fragmentation and facilitate viable and stable collective bargaining without causing serious labour relations problems - Board directing that bargaining units be combined and remaining seized with regard to further relief

BEFORE: *Judith McCormack*, Chair, and Board Members *G. O. Shamanski* and *E. G. Theobald*.

APPEARANCES: *James K. A. Hayes*, *Thomas E. Collins* and *Robert McKay* for the applicant; *Wallace M. Kenny*, *David Crisp* and *Andre Joron* for the responding party.

DECISION OF JUDITH McCORMACK, CHAIR, AND BOARD MEMBER E. G. THEOBALD;
October 13, 1993

1. This is an application under section 7 of the *Labour Relations Act* in which the applicant seeks to combine seven store bargaining units in Southern Ontario.
2. The bargaining units in question include four stores in Windsor, Kitchener, Kingston and Brampton, and three in Metropolitan Toronto. For the most part, they were organized in 1984 and 1985, and at the time they were organized, there were a total of 26 bargaining units certified in nine stores. Since that time, two of the stores have been sold to another company, where the union continues to represent employees.
3. Both parties in this matter referred us to their collective bargaining history, and as a result, we heard considerable evidence in this regard. In the first round of bargaining in 1985, negotiations were conducted on a store by store basis. The effect was that there was one set of negotiations for each store, and bargaining commenced at different times. The negotiating committees from both sides differed in composition from store to store, and there were separate union staff representatives involved. The union tabled a group of generic proposals for each set of negotiations, to which specific concerns on the part of employees at a particular store were added. Although the negotiations were conducted on a store by store basis, the agreements reached were incorporated into contracts for each bargaining unit.
4. In the 1987 round of negotiations, the parties initially agreed to hold store by store negotiations as well, but decided they would pick three representative or lead stores. As a result, they set up a schedule of approximately twenty negotiating meetings for Kingston and Windsor and one of the Toronto stores. Again, the union submitted one set of proposals for all locations. While the company had separate packages of proposals for each store, they were virtually identical.
5. The lead store arrangement proved problematic for both sides. From the company's point of view, the effect was that negotiations were repetitive and frustrating. As a result, the bargaining turned into a sort of running discussion where according to David Crisp, the company's Vice-President of Human Resources, the parties were essentially treating them as one set of negotiations. Thus where the parties had discussed certain proposals at one of the lead store sessions, they would naturally continue on where they had left off when they started the next lead store meeting, rather than discussing the same proposals over again.

6. However, this evolution raised problems from the union's point of view, as the negotiating committees had been set up for store by store negotiations. This meant that there were different negotiating committees elected from each store, with the effect that as discussions evolved into one set of negotiations at three different locations, each committee would miss out on parts. After three meetings, one in each lead store, the parties agreed to one set of negotiations for all stores, and they altered the composition of their respective bargaining teams to this end. This resulted in one memorandum of agreement for all stores, which was then again turned into collective agreements for each bargaining unit. While the union had proposed to formally combine the bargaining units, this proposal was rejected by the company. In this round, the parties also struck subcommittees in negotiations to address the questions of commissions and clerical classifications, which were issues specific to certain stores. The purpose of the clerical subcommittee was to try and standardize clerical classifications between stores.

7. For the 1989 round of negotiations, the parties again agreed to one set of negotiations for all stores. As in the previous round, the union and the company's initial proposals were the same for all stores. Bargaining was centralized again and all stores were dealt with simultaneously at one bargaining table. One memorandum of settlement was signed for all stores, which was then turned into one collective agreement for each store. The parties also agreed to consolidate the bargaining units within each store.

8. In December of 1992, the union gave notice to bargain for the next round of negotiations. The following week, Tom Collins, at that time the Canadian director of the union, had a conversation with Andre Joron, Director of Employee Relations for the company, in which they agreed upon some dates for bargaining sessions. Because of the way the last two rounds had proceeded, Mr. Collins assumed that there would be one set of negotiations again. Indeed, the union had drafted its proposals and elected its negotiating committee on this basis. Mr. Joron told Mr. Collins that he was not sure about the process, and Mr. Collins then replied that the union would make an application for consolidation. Mr. Joron responded that he would have to talk to some of his people and get back to Mr. Collins. On January 20th, the company sent the union a letter, proposing to negotiate only the Brampton store and the three Toronto stores (Sherway Gardens, Cedarbrae and Warden Woods) at a central table. The union then brought this application on January 29, 1993.

9. Not surprisingly in light of this history, the contents of the seven collective agreements are now almost identical; there are some minor variations for specific employees and specific classifications or circumstances which may not apply to all stores. There are also some differences in wage rates, based on factors such as local labour markets. The union produces one collective agreement booklet for all stores, which the company's staff use as well from time to time.

10. The stores themselves are essentially the same in the sense that they are all branches of a major department store chain. There is some variation in size, and some differences in merchandise, services offered and store hours, geared to the area, the clientele and the market niche. This is not necessarily related to geographic location. For example, according to Mr. Collins, the store in Sherway Gardens is more like the Windsor store than Cedarbrae and Warden Woods, the other two Toronto stores, which have a smaller, less up-market clientele. This is true as well for some of the common marketing issues. For example, a question with respect to selling men's clothing may arise both in Windsor and Kingston.

11. Staff at each location perform basically the same functions including sales, clerical and so forth. Some stores might have certain areas contracted out, such as restaurants or hair salons,

and there may be fewer supervisors or visual presentation staff at smaller stores. In addition, the mix of full-time and part-time employees varies to some extent.

12. The reporting structure of the Bay is divided into three regions: Eastern, Western and Ontario. In June of 1991, the Kingston store was assigned to the Eastern region. All other stores are in the Ontario region. The six Ontario region store managers in this case report to two geographic regional managers, who then report to one general sales manager. The general sales manager for each region reports to the Vice-President of Stores. All stores in this case but the Kingston store have the same general sales manager.

13. In terms of labour relations, the company has a central human resources department which draws up the company's policies and procedures, conducts negotiations, participates from time to time in third step grievance meetings and provides advice to other human resource staff. These include a human resource manager in each store and one for the region, occasionally with an assistant. Mr. Crisp and the central office human resources people have conducted the negotiations, although regional managers have been included in the bargaining committees. Benefits and pension plans are the same across Ontario, as are policies and procedures relating to such issues as missing return sales bills, and in-store marketing.

14. Before 1984-85, there were seven regions within the Bay with seven independent buying offices. According to Mr. Crisp, this was a serious problem, especially where they were buying from centralized resources. As a result, the buying operation is centralized. This was accompanied by a centralization generally of the company's operation. Now, the company is having second thoughts about centralization, and more emphasis is being placed on some degree of local flexibility. This is in the service of a philosophy of motivating employees by empowering them, which involves pushing decision-making downwards. Mr. Crisp was of the view that if the company had the money, it would probably expand the number of regions again to five or six. He would also like to see regional managers handling negotiations, although he felt this goal was fast fading into the sunset.

15. On the union side, there is one composite local which represents employees at all stores. The bargaining process is commenced by amendment meetings at each store to generate proposals and to elect members of the negotiating committee. Sometimes several stores are combined for this purpose. Then one elected policy committee reviews the proposals and whittles them down from approximately 200 to 60, and one bargaining committee with elected representatives from each store conducts negotiations. Ratification by employees was done by unit in 1985, by store in 1987, and across certain stores in 1989. In both the 1987 and the 1989 rounds, employees were told that the union would not ratify the central memorandum of agreement unless all stores agreed; since they did, it was not an issue.

16. In the 1989 negotiations, a strike vote was conducted by the union. The union tabulated the votes at each of the stores, and then tallied a provincial total, with the idea that they would only strike if 50% of the employees across the province voted to do so. As it turned out, a settlement was reached.

17. The parties settled their pay equity plans for all stores at one set of negotiations. Sample questionnaires were developed and all jobs were evaluated together. The results were also evaluated with reference to the company as a whole and by job comparisons between companies. (The union also represents some Zellers stores which along with these stores and others are part of the Hudson Bay Retail Group.) At a certain point the parties were unable to agree on comparators and applied to the Pay Equity Commission for assistance. Eventually the parties agreed to find comparators for the two most common jobs in all the stores, sales employee and department head.

They then agreed to a scale of corrections for these positions amortized over a period of time. Emerging from this settlement were three plans, one for the three Toronto area stores and Brampton, one for Kingston, and one for Windsor. Although they were essentially the same, there were three plans because of the difference in wage rates in those locations. The Kitchener pay equity plan had already been settled before the union became certified.

18. It appears that grievances are generally handled at the store level for the first and second stage. At the third level, the union has usually dealt with Mr. Crisp, Mr. Joron, and the regional managers. Most of the grievances filed are resolved at the third stage, or beyond the store level. Despite the fact that the Kingston store is in the Eastern region where the regional office is in Montreal, Mr. Crisp agreed that no one from Montreal has ever dealt with a grievance from the store. However, he believed that the Kingston store had never had a grievance.

19. In expressing his views on the viability of a combined unit, Mr. Collins referred the Board to the provincial bargaining units the union represents in the grocery industry for Dominion stores, A&P and New Dominion stores, Mr. Grocer stores, and No Frills stores. He testified, for example, that the collective agreement for the A&P-New Dominion stores covers one bargaining unit for 100 stores and 5,500 employees. In his view, such an arrangement did not prevent the parties from addressing and being responsive to local conditions in terms of profits, sales, size of stores and financial conditions. In this regard, he pointed out that the parties to that collective agreement have included appendices for fifteen financially troubled stores with different classifications, work weeks, hours of work and wage progressions, in response to the deteriorating financial conditions in those stores. Similarly, for Mr. Grocer stores, there are 35 stores, and 1600 employees in one bargaining unit. Again, there are also a number of specific issues with respect to people and wages for specific locations, and the union has on a number of occasions agreed on different terms relating to variations in marketing approaches and local conditions. Mr. Collins also referred to the United States where the union represents department stores such as Macy's from New York to Florida in one bargaining unit, and to United Food and Commercial Workers Union master agreements with Loblaws, A&P and Steinbergs which cover multiple stores.

20. Mr. Crisp did not feel Mr. Collins' comparisons with grocery stores were apt because in his view, grocery stores did not have such individual and distinct markets and cultures as department stores. He acknowledged, however, that there were differences in terms of market niche between flagship Loblaws, upmarket Ziggy's and No Frills stores, for the same sorts of reasons in terms of local clientele and ethnic markets as the variations in department stores. In addition, he agreed that there were differences between grocery stores in terms of merchandise, and variations in things like whether there were deli counters, bakeries, fish counters, and flowers. As well, he agreed that grocery stores contract out such items as wine, hardware, ticketron, shoes, pharmacies and bank machines. When asked by his counsel about his previous experience as a union side negotiator with the North York secondary school system, where, for example, fifty schools were in one bargaining unit, he said he felt that the schools and teachers were interchangeable, and thus could not be compared to the instant case.

21. Section 7 provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates

with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.

2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

22. Since it was not suggested that this case involved either a manufacturing operation or the construction industry, we find it useful to set out the Board's discussion of section 7(3) in the recent case of *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523:

6. The task of facilitating viable and stable collective bargaining in connection with bargaining units is familiar territory for the Board, which has explored this theme extensively in the context of determining appropriate bargaining units at the point of certification. This is true as well for the proposition of reducing fragmentation, since the Board has sought to avoid undue fragmentation in shaping units. Much of the Board's jurisprudence reflects a relatively sophisticated approach to these issues, which has evolved over a number of years of considerable experience. Accordingly, we find it useful to review some of that jurisprudence under section 6 in considering these criteria in the context of combining bargaining units as well.

7. We observe firstly that viability, stability and fragmentation have been interwoven in the Board's determination of bargaining units. A review of the cases indicates that the Board has considered more comprehensive bargaining units and minimizing fragmentation to be key elements in facilitating viable and stable collective bargaining. For example, in *The Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, the Board expressed the view that fragmentation may make it impossible to have a viable and meaningful collective bargaining relationship:

18. The fact-finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, [1969] January OLRB Mthly. Rep. 1016.

8. The British Columbia Labour Relations Board set out the same kind of factors favouring broader bargaining units in the *Insurance Company of British Columbia*, [1974] 1 Can LRBR 403 (adopted by this Board in *National Trust*, [1986] OLRB Rep. Feb. 250) where it said at p. 259 as follows:

The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.

* * *

A second administrative factor, this one clearly in the interest of both employer and employees, is the matter of *lateral mobility*. The presence of several bargaining units, each with their seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.

* * *

The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has developed a wage structure whereby all the positions across every division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees.

* * *

Another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately.

9. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board noted that in striving to create a viable structure for collective bargaining, a broadly based bargaining unit offers several advantages over a fragmented structure, and went on to elaborate on the undesirable effects of fragmentation, including the increased risk of work stoppages:

15. Organizational concerns are not the only forces that shape bargaining units. The

Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRB 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable [sic] spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. *All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.*

10. Similarly, in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, the Board suggested that fragmentation could contribute to labour management problems, tension within and between bargaining units, and an escalation of industrial conflict, and described fragmentation as "a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unraveling". And in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7, the Board noted that fragmentation could result in a weak employee presence at the bargaining table.

* * *

14. Much of this discussion is useful in the context of section 7 as well. Indeed, in *Olympia & York Developments Limited*, April 8, 1993 (unreported) the Board reiterated some of these views in the context of an uncontested combination application:

7. This bargaining unit description consolidates the above-mentioned employee groupings into a single unit for collective bargaining purposes. It avoids fragmenting a group of building service workers into two legally distinct units, each of which would encompass only a handful of employees. And, of course, if there were two separate units, that could mean: separate bargaining, separate collective agreements, separate seniority regimes, a strike of one or other of these employee groupings at different times, and potentially two trades unions, should one or other of these employee groups choose to displace the Transit Union (as has happened before in this organization). This is not a recipe for stable or effective collective bargaining, nor (as noted) did the employer appear at the hearing to substantiate any concerns it might have about the proposed consolidated bargaining structure.

In *Premark Canada Inc.*, [1993] OLRB Rep. June 540 the Board also noted the similarity of some of the criteria in section 7(3) to those applied by the Board in section 6:

26. Section 7(3) of the Act outlines three factors that the Board shall consider in an application to combine bargaining units. Section 7(3) directs the Board to look at the extent to which combining bargaining units would facilitate viable and stable collective bargaining, would reduce fragmentation of bargaining units, or would cause serious labour relations problems. The parties focused on these three factors. There was no dispute that section 7(4) of the Act did not apply, based on the facts in this case.

27. The factors set out in section 7(3) have long been utilized by the Board pursuant to the exercise of its discretion, contained in section 6(1) of the Act, to determine the unit of employees that is appropriate for collective bargaining in an application for certification. An adjudication on the issue of whether or not it is appropriate to combine bargaining units is in some ways similar to a hearing before the Board to determine the appropriateness of a bargaining unit description in an application for certification.

Of course, the criteria are also different in some respects from those applied in certifications as the Board observed further in *Mississauga Hydro-Electric Commission*, *supra*:

At the same time, it is also evident that the Board's approach to combining bargaining units must be somewhat different than the method the Board uses to structure those units at the point of certification. Although the criteria in section 7(3) echo some of the themes addressed by the Board under section 6, there are some notable absences. Section 7(3) does not employ the language of appropriateness set out in section 6, and there are obvious differences in the kinds of factors relevant even to viability. For example, the Board may not have the same concern that larger bargaining units might impede the right of employees to organize themselves in a combination application, when access to collective bargaining is not an issue. This brings the problems associated with fragmentation and its impact on viable and stable collective bargaining into sharper focus. Indeed, in the absence of this concern, the Board's views on the undesirable impact of fragmentation may suggest a more marked preference for larger units. Likewise, the Board's approach to displacement applications for certification is shaped to some extent by specific considerations with respect to gerrymandering, which may take a different form in the context of combination applications.

23. In this case, the company argued that the parties had a viable and stable relationship, that there had been no strikes or lockouts in its eight-year history, and that the Board should not fix what was not broken. In counsel's view, an applicant should have to demonstrate some significant problem with the existing arrangement, or a compelling reason for combination. The Board addressed a similar argument in *Mississauga Hydro-Electric Commission*, *supra*:

19. The employer in this case urged the Board to adopt an approach to section 7 in which bargaining units would not be combined unless the applicant could point to serious labour relations problems in the existing bargaining framework. Implicit in this proposition is the idea that since the Board will have initially determined that one or more of the units was appropriate, there should be some significant threshold for an applicant to overcome in terms of subsequent combination. Although at first glance this approach is not without some advantages, further examination reveals a number of flaws.

20. At the outset, it is important to note that the Board has acknowledged the elasticity of the concept of the appropriate bargaining unit. Rather than seeking to ascertain the one perfect bargaining unit in each situation, it has recognized that there may be more than one equally appropriate bargaining unit in a particular case. In *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board noted as follows:

21. None of this is new of course. The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective

bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit. Full-time and part-time employees can be segregated, but there are many situations where they have not been.

If there can be more than one appropriate unit, the Board's determination at the certification stage may not carry as much weight in a subsequent combination application.

21. In addition, certifications for existing units have taken place over a span of almost fifty years. A number of them were based on assumptions, for example with respect to the part-time employees, which have come under increasing scrutiny in the wake of changing social and economic conditions. Moreover, as we noted above, some bargaining units may have been shaped to a very significant degree by factors more relevant to certification than combination, such as the concern that larger bargaining units may impede organization. It is also true that bargaining unit determinations in certification applications take place in a context in which the issues are often framed by the parties with reference to the impact it will have on the chances of certification. The parameters established by the parties in this regard may affect the ultimate decisions. Similarly, many bargaining unit determinations are also based on agreement by the parties, and the Board has often been content to found its decisions in this area on such agreements, even to the point of accepting units it would not normally establish itself. Finally, many existing bargaining units are based on historical anomalies. For example, at one time, meat cutters in the retail sector had their own union and a quasi-craft status. When that union amalgamated with another, the pattern of separate organization continued to some extent, so that it is not uncommon to see units consisting of meat department employees only, a somewhat unlikely unit to be determined by the Board in the absence of this history. These kinds of historical anomalies can also be found in the printing industry, the health care sector, and so forth.

22. As a result, the current bargaining unit landscape represents a veritable hodgepodge of rational and sound structures, outdated assumptions, specific organizing patterns, historical anomalies, individual agreements by parties, and Board determinations in a context where the parameters of litigation may have been distorted by strategic concerns. To this extent, it may be difficult to marshal the status quo in aid of an approach to combination orders which requires the applicant to meet a significant threshold.

23. We find it instructive as well that the language of section 7(3) does not suggest that the combination of units is to be resorted to only as a remedy for a problem of some kind. A comparison with the phrasing of other provisions such as section 41(2) highlights this difference. That section sets out criteria which must be met for the Board (as opposed to the Minister) to direct the arbitration of a first contract. Included is a stipulation that the collective bargaining process has been unsuccessful for a number of reasons, including several identified problematic situations. This somewhat more remedial focus is absent from section 7.

24. In addition, section 7(3) uses words like "the extent to which", "facilitate" and "reduce". "Facilitate" is defined in *The Shorter Oxford English Dictionary* (Oxford: Clarendon Press 1978) as "to render easier; to promote, help forward". This language suggests that it is not necessary to establish an existing problem to succeed in an application, but only that the combined unit might make viable and stable bargaining easier, for example. We note as well that section 7(3)(b) refers only to fragmentation, and not undue fragmentation. This also implies a fairly low threshold for an applicant.

25. Counsel for the applicant referred us to cases from British Columbia, including *B. C. Ice and Cold Storage Ltd.*, [1978] 2 Can LRBR 545, where the British Columbia Labour Relations Board established two preconditions for an application for consolidation to succeed: one of the units must no longer be appropriate, and there must be some resulting jeopardy to the employer, potential or present. However, as counsel pointed out, the jurisdiction employed by the British Columbia Board to combine units derives from a general reconsideration power, rather than a specific statutory mandate which sets out criteria. In addition, the British Colum-

bia power is used to consolidate units where there are different bargaining agents. Since the effect of combination in these circumstances is to extinguish the bargaining rights of one of the unions, it is not surprising that the British Columbia Board would be inclined to a narrow view of this exercise.

26. We were also referred to two cases from Saskatchewan, including *Canada Safeway Limited*, (1992) First Quarter, Sask. Labour Report, p. 47 in which the Saskatchewan Labour Relations Board found the *B. C. Ice* test to be too restrictive. It indicated that the central issue was whether the consolidated unit applied for would be appropriate, not whether one of the existing units was inappropriate. It then adopted the approach set out in *SJBRWDSU v. OK Economy Stores Limited*, [1990] 7 Can LRBR 286, where the same Board listed a number of factors in its consideration of whether a consolidated bargaining unit would be appropriate, including viability, community of interest, organizational difficulties, industrial stability, wishes or agreement of the parties, the organizational structure of the employer and the effect on its operations, and the historical patterns of organization in the industry. The Board went on to suggest that two of those factors would receive particular emphasis in combination applications: firstly, whether the employees in the proposed unit share a sufficient community of interest to warrant consolidation, and secondly, whether the consolidated unit will promote industrial stability. At the same time, because the bargaining unit is being considered in the context of consolidation rather than certification, the Board will begin with the premise that an existing unit is appropriate and will look to whether the historical bargaining practices of the parties indicate a community of interest in a larger unit which is appropriate, given the considerations referred to above.

27. We find this approach somewhat unsatisfactory in the context of section 7(3) as well. For one thing, if the premise that an existing unit is appropriate simply reflects the fact that this was the configuration determined at the time of certification, this is of limited value for the reasons we set out earlier. Similarly, although we do not discount that some of the factors listed by the Saskatchewan Board may turn out to be useful in the Ontario context to the extent they affect viability and stability, there are a number of caveats worth noting at this time. Like the British Columbia provision, the Saskatchewan section is a more generalized power of reconsideration rather than a specific mandate, and there are significant differences in wording. In this regard, we have already commented on the issue of community of interest in terms of this Board's experience and the language of section 7(3). In addition, while we think that this is some obvious merit in considering on the employer's organizational structure and the effect on its operations under section 7(3), in considering the weight of this we cannot ignore the fact that section 7(4) focuses explicitly on the employer's operations in manufacturing in a way the Legislature did not see fit to apply more generally in section 7(3). Similarly, while we agree that the parties' historical bargaining practices may be of some value, it must be remembered that in Ontario, a party may propose changing the shape of the bargaining unit in negotiations, but cannot press the issue to an impasse without running afoul of the duty to bargain in good faith. Thus where the parties have agreed on a bargaining pattern different from that determined at certification, it may well be very instructive; where the parties have been unable to reach agreement, this fact may be of somewhat limited value.

28. Having carefully reviewed these cases, we are of the view that it is not appropriate to set up a particular onus in the face of the specific criteria set out in section 7(3). The test in the Ontario provision has already been provided by the Legislature. While that test is not exhaustive, and while our understanding of that test may be enriched by the Board's extensive experience in shaping bargaining units to date, the central issue before us is still whether an application meets that test. Accordingly, we find that we must consider whether the consolidated unit sought would, at least to some extent, facilitate viable and stable collective bargaining, reduce fragmentation, or cause serious labour relations problems.

We find these comments equally pertinent to the case before us. Moreover, the proposition that an applicant should have to establish some problem with the existing situation before the Board will combine units is even less persuasive in a context where the parties have themselves initiated a significant degree of combination in practical terms.

24. The company acknowledged that combining the bargaining units in this case would reduce fragmentation. In counsel's view however, it was not undue fragmentation. The issue of

what constitutes "undue" fragmentation, as opposed to simply fragmentation, strikes us as a thorny problem, not amenable to either definitive or easy answers. Fortunately, it is not necessary for us to decide this matter, since, as the Board noted in *Mississauga Hydro-Electric Commission, supra*, section 7(3)(b) refers only to fragmentation.

25. Counsel for the company also referred us to a number of cases where the Board had determined smaller, one location or one department bargaining units were appropriate in the context of certification applications, or where the Board referred to a policy discouraging cross-municipality certifications where, among other things, there was no interchange of employees between the different locations. However, as the Board observed in *Mississauga Hydro-Electric Commission, supra*, determinations of bargaining units in certification cases may involve different considerations:

11. In other words, it is well established in the Board's jurisprudence that facilitating viable and stable collective bargaining in the context of bargaining unit determinations is strongly connected to minimizing fragmentation. In certification cases, however, this is tempered by an opposing concern that bargaining units not be described so broadly that they impede access to collective bargaining. In *Ryerson, supra*, the Board noted that assisting employees to join together for collective bargaining was a fundamental objective of the *Labour Relations Act*, and that as a result, the Board has been reluctant to establish units that are so broadly based that they defy organization:

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

* * *

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited, supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been "hard pressed" not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination.

12. In the same vein, the Board said in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330:

In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all.

13. Indeed, in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board expressed the view that "[w]here, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization".

26. In other words, the Board may consider factors in fashioning bargaining units at the time of certification which may be less relevant in combination applications where employees are already organized. For example, in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7, the Board noted that in determining appropriateness the Board had developed two general themes of fundamental importance, the right of self-organization and the need for a viable collective bargaining relationship:

Two themes of fundamental importance appear to emerge from these sources, the right of self-organization and the need for a viable collective bargaining relationship.

A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, s. 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, (1969) OLRB M.R. 340.

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, (1973), OLRB M.R. 102, and in the *Board of Education for the City of Toronto* case, *supra*.

27. More specifically in *Coca-Cola Ltd.*, [1989] OLRB Rep. Jan. 1, the Board referred to *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656 in setting out the reasons for the one location practice in certification which included, among other things, the right to self-organize, and providing a measure of predictability for organizing purposes. In the latter case, the Board included these quotes from *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491 in discussing the one location practice and awarding a multi-location bargaining unit:

29. This does not mean, however, that a regional bargaining unit will never be appropriate. Rather it simply means that such a unit must be consistent with two basic considerations - 1) the right of self-organization; 2) the requirement that collective bargaining relationships be viable.

* * *

30. In this case, the applicant has organized all but one of the stores falling within its proposed bargaining unit description, virtually eliminating any interference with the right of self-organization. This means that in this case considerations of viability assume greater importance.

28. Again in *Tip Top Tailors*, [1979] OLRB Rep. May 445, the Board also ties in its policy on bargaining unit certifications to the right of employees to obtain union representation, among other things:

20. Having reviewed all of the foregoing and in particular the evidence with respect to transfers, the Board finds that the extended area bargaining unit argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation. That right is the foundation and base upon which the whole structure of the Act is built. To require the employees of the respondent to organize the whole area which includes so many municipalities would be to defeat the paramount purpose of the Act.

29. Initially the Board determined that a municipality wide unit was appropriate for stores (*The Goodyear Service Stores* (1964), 65 CLLC ¶16,018). However, in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, the Board found that either a one branch unit or a unit consisting of all branches in Southwestern Ontario shared a community of interest. In deciding to certify a one branch unit, the Board again referred to its concerns about access in the passage cited in *Mississauga Hydro-Electric Commission*, *supra*, and adopted the views of the British Columbia Labour Board to this effect:

27. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia*, (No. 2) decision of the same Board:

“However, clearly one can’t have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union’s representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.”

30. In *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board identified three statutory objectives which must be balanced in determining the appropriate unit in certification applications:

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade union to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case.

31. The Board also noted that the concern about fragmentation was weightier where the Board was unable to restructure bargaining units at a future date, as was the case at that time:

11. There are other important considerations which enter the picture as well where the

employer operates from two or more locations within the same municipality. Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern or organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date.

32. Many of the single branch determinations in this sector can be explained by the following passage in *K Mart, supra*:

18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern of organization. Furthermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

33. The Board noted in *K Mart* that in the earlier cases of *Goodyear, supra*, and *Cybermedix Limited*, [1979] OLRB Rep Aug. 743, the union had organized all employees in the municipality and was requesting a municipality wide unit, as had the union in *Fotomat Canada Limited*, [1979] OLRB Rep April 306 and in *Tip Top Tailors*, [1979] OLRB Rep. May 445. In that sense, these cases were not inconsistent with *K Mart* decision, the Board said, the latter two because the Board gave favourable consideration to the pattern of union organizing, and took into account the adverse effect upon access to bargaining:

17. The Board has reviewed both *Fotomat, supra*, and *Tip Top Tailors, supra*, relied upon by the respondent. The primary issue in both cases is different than that raised in the instant case. In both cases the Board was asked to depart from its standard practice of circumscribing bargaining rights by reference to the municipal boundary and to certify on a broader basis. While the Board refused, and certified for all stores within single municipalities, in both cases, its reasons for doing so lend support to the position of the applicant in this case. In both these cases the Board gave favourable consideration to the pattern of union organizing, as the applicant asks us to do in this case. In both cases, as in the *Goodyear* and *Cybermedix* cases the union organized on a municipal-wide basis. Furthermore, in both cases the Board took into account, as the applicant asks us to take into account in this case, the adverse effect upon employee access to collective bargaining of unit descriptions extending beyond a single municipality. The Board commented in its *Fotomat* decision that any drawbacks associated with the possibility of the respondent having to deal with a multiplicity of bargaining units "are more than outweighed by the restrictive effect that a single bargaining unit would have on the right of the respondent's employees to decide whether or not they wish to be represented for collective bargaining purposes". Similarly in its *Tip Top Tailors* decision the Board found that "the extended bargaining area argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation."

34. In *National Trust*, [1986] OLRB Rep. Feb. 250, the Board reviewed the jurisprudence in the service sector at great length. Among other things, the Board was prepared to grant a multi-

location bargaining unit even at the point of certification as an option available to an applicant, without signalling a rejection of single branch units:

13. The preamble to the *Labour Relations Act* discloses a clear legislative predilection toward the fostering of collective bargaining, and nowhere has that predilection been reflected more than in the determination of the "appropriate" bargaining unit under section 6(1). Each time the Board is persuaded to move to a further stage in bargaining-unit determinations, the history of the jurisprudence shows that the effect of that movement generally is to increase the options available to unions for organizing in the province. Exactly as applicant counsel has argued, in other words, the finding, if the Board were to make it, that a grouping of seven certifiable branches within Metro is the appropriate bargaining unit in the facts and circumstances of this case, would not in any way signal a rejection of the basis on which single-branch units have in the past been, or in the future would be, found to be appropriate (or the basis upon which they have been agreed to be appropriate in the present case).

(emphasis original)

This was adopted by the Board in both *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226 and in *Famous Players*, [1990] OLRB Rep. May 509, and the case is cited in other respects in *VS Services Ltd.*, [1987] OLRB Rep. June 931 and *The Board of Education for the City of Scarborough*, [1987] OLRB Rep. Jan. 119. The Board went on to quote from *Canada Trustco*, *Woodward Stores*, *Insurance Corporation* and *K Mart*, *supra*, in this regard, and noted the British Columbia Labour Board's practice of certifying single branch store units and combining them subsequently. However, the Board also observed that neither the practice of this Board to certify single store or branch units or the B.C. Board's practice in this regard vitiated the overall principle that "bigger is better" in terms of issues such as fragmentation. Rather, they reflected the Board's concerns about access to collective bargaining.

35. *National Trust*, *supra*, was quoted at length in *Famous Players* where the Board found a single theatre to be an appropriate unit. Again, the Board's decision is based in part on the obstacles to organizing a municipal-wide unit would create:

Although fragmentation and a potential multiplicity of bargaining units could result if a single theatre is found to be appropriate, as the jurisprudence recited indicates, those legitimate and significant concerns must be weighed against the obstacles to organizing that would be created by finding a multi-branch bargaining unit to be the only appropriate bargaining unit.

9. It may well be that the employer's prediction will prove to be accurate and the bargaining unit sought by the applicant will not provide it with sufficient bargaining strength to secure any significant gains for the employees. But this potential bargaining strength problem does not warrant the conclusion that bargaining would not be viable in what is otherwise an appropriate unit, a unit where employees share a sufficiently coherent community of interest.

36. In summary then, in certification applications the Board has considered a number of factors relating to facilitating organization and fostering self-determination which may not be relevant to combination applications, or which may have different implications in this context. As a result, these cases do not suggest to us that the units before us should not be combined.

37. We turn next to three cases which the company suggested pointed away from the combination of these units. The case of *Bank of Montreal*, [1982] 2 CLRB 380 suffers from some of the same distinctions the Board noted in *Mississauga Hydro-Electric Commission*, *supra*, with respect to the jurisprudence of other provinces. As in British Columbia, the Canada Labour Board was operating under a general power of reconsideration, rather than a specific statutory mandate which sets out criteria, which is the case in Ontario. In addition, the Canada Board power is used to consolidate units where there are different bargaining agents. Since the effect of combination in these circumstances is to extinguish the bargaining rights of one of the unions, it is not surprising

that the Canada Board, like the B.C. Board might be inclined to a narrower view of this exercise. In any event, in this case the reason identified by the union for consolidation was bargaining strength, and the Board found that the company had not used the imbalance in power to dilute the union's bargaining strength or render it impotent at the bargaining table. It is not necessary for us to make such a finding in this case, because we are using the criteria set out in section 7(3) rather than bargaining power in considering this application.

38. Similarly, the Alberta cases of *Horne and Pitfield Foods Limited*, [1990] Alta LRBR 244 and *Burnco Rock Products Ltd.*, [1989] Alta LRBR 203 are not particularly relevant. In the former certification application, the Board found that there was no community of interest between the three units applied for, and in the latter, the Board dismissed a reconsideration application on the basis that it was really an untimely and already withdrawn certification application filed under the wrong section of the Code. In any event, the Board was not convinced that it was appropriate to combine when, among other things, the applicant was only seeking to combine a portion of its existing units.

39. Finally, we have examined the printing industry cases submitted to us without finding much assistance. It is clear that the Board will sometimes find smaller, more fragmented units appropriate based on the history of this industry (*The Globe and Mail Limited* (1963), 63 CLLC ¶16,290; *Peterborough Examiner*, [1982] OLRB Rep. March 432; *The Sault Star*, [1983] OLRB Rep. June 980; *The Ottawa Citizen*, [1987] OLRB Rep. Aug. 1098). On the other hand, even in the same industry the Board will also decide on larger units depending on the circumstances of the case (see *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451 and *Harlequin Enterprises*, *supra*).

40. In the matter before us, the evidence indicates that the company is a relatively centralized operation, and its approach to labour relations is no exception. Although Mr. Crisp indicated that the company was having second thoughts about the degree of centralization, those reservations do not seem to have been translated into any concrete plans. To say, for example, that if the company had the money, it would probably expand the number of its regions to five or six is a very tentative proposition.

41. The distinctions between stores are relatively minor in the overall picture of the facts of this case. In essence, the stores are all branches of a major department store company, and the functions performed by employees are basically the same, regardless of where they are located. Indeed, it was apparent from the limited differences between stores which the company attempted to highlight that there was in fact a significant degree of standardization. Of those distinctions, many were at best marginal, if not irrelevant to the kinds of labour relations issues involved here. For example, whether a store contacts the central buying office by electronic mail, or as in the case of the Toronto stores, by personal visit, has no bearing on the criteria under section 7(3).

42. In addition, those distinctions were not necessarily geographically based, as noted earlier. It was clear that the Toronto stores, which the company was prepared to combine as an alternative submission, were in some cases more dissimilar than those separated by geography, suggesting that those differences were not particularly momentous, even from the company's point of view. In fact, some of the differences dwelt on by the company in these proceedings involved employees such as commissioned and non-commissioned salespeople, who are already in the same bargaining unit.

43. In any event, it was apparent from the evidence before us that local autonomy and market flexibility were not inconsistent with a combined structure. In their centralized bargaining to date, the parties have from time to time agreed upon specific provisions for particular stores, classifications, or individuals in one set of negotiations leading to one memorandum of agreement. We

accept that there is a need to maintain a balance between the convenience and strength of standardization and the need to be responsive to local conditions. However, as the evidence in this case demonstrates, there are a number of ways to do this, including letters of understanding and collective agreement provisions addressing particular problems. There are also other options in terms of bargaining arrangements with respect to the mix of local and central issues, although in this case, it was apparent that the parties had not adopted those options because the number of local issues was relatively minor in contrast to those which the stores held in common.

44. The evidence also indicates that the tension between central and local issues is an important matter for the union as well, which must be responsive to its local members if it is to remain viable. The parties' mutual interest in being alert to this issue means that combining these units does not leave the company particularly vulnerable in this regard.

45. Some of Mr. Crisp's concerns had more to do with maintaining a degree of spontaneity and flexibility in a relationship regulated by collective bargaining than with the size of the bargaining unit. For example, he was concerned that the existence of a meal allowance provision in the collective agreement would mean that a store manager would not be able to send out for pizza for employees during inventory. However, this is an issue which is not dependent on whether there is one bargaining unit or seven, as demonstrated by the fact that there are already meal allowance provisions in the collective agreements for these stores. His other examples with respect to potential restrictions in hiring or in conversations between managers and employees seemed unlikely. It is certainly not obvious that a combined bargaining unit would interfere with the promotion and maintenance of individual relationships between employees and their store managers, and there was no cogent evidence that the parties' own centralized bargaining experience had led to any such difficulties.

46. The fact that the company took the position in January of 1993 that only four of the stores should be negotiated at a central table does not strike us as particularly telling, coming as it did shortly after section 7 was added to the Act and in the shadow of this application. While the company suggested that the reason for this change of heart was that the parties had not been able to address individual issues in bargaining, there was no material evidence of this. In fact, the evidence suggested the contrary, that the parties had generally been able to successfully accommodate and address local issues where necessary. In any event, this reason was not altogether consistent with the company's willingness to continue to deal with four stores together in bargaining.

47. It was apparent from the company's evidence that the option to return to store by store negotiations was a bargaining chip for the company which it was reluctant to lose. We accept that combining these units may result in some type of shift in bargaining power in this regard. However, this does not appear to be the kind of serious labour relations problem contemplated by section 7(3) which would persuade us to dismiss this application.

48. Finally, it was evident that Mr. Crisp took a very thoughtful and sophisticated approach to labour relations, contributing to a professional and productive labour relationship between these parties which is in marked contrast to the difficulties experienced by other parties in this sector. However, we do not think that the philosophy of empowering employees is in conflict with combining these units, particularly since, as Mr. Crisp acknowledged, any such approach must be integrated with a collective bargaining regime. Nor do we find the company's arguments distinguishing the *Mississauga Hydro* and *Premark* cases to be very persuasive. There is no question that the facts in this case are different in some respects from each of those cases, and we have considered those differences very carefully. They do not suggest to us that the result should be different for the reasons we have set out above.

49. Taking the evidence as a whole, and having regard to the Board's jurisprudence referred to above, we conclude that combining these units would reduce fragmentation, and would facilitate viable and stable collective bargaining without causing serious labour relations problems. As a result, we direct that the seven bargaining units before us be combined. We remain seized with regard to any further remedial relief.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; October 13, 1993

1. I dissent.

2. Consolidation of existing bargaining units would not serve to facilitate collective bargaining in this instance. Indeed, a sufficient community of interest between units is clearly lacking. There are variations in the size of the stores, the merchandise offered, store hours and services available at each of the locations. In addition, some stores have certain areas such as restaurants or hair salons contracted out, while other stores do not. Attempts to bargain collectively in the absence of a clear community of interest will undoubtedly lead to a strain on labour relations.

3. A lack of community of interest is further amplified by the geographical diversity of the stores. The location of the seven units span from Windsor to Kingston. The stores have different markets and they structure their operations accordingly. Combining bargaining units would not ensure the flexibility necessary to continue efficient operations at the individual stores and would ultimately cause serious labour relations harm. At best, I would have combined the three stores in Metropolitan Toronto as one unit while leaving the stores in Windsor, Kitchener, Kingston and Brampton as single units for the purposes of collective bargaining.

4. Furthermore, I find that the cases of *Premark Canada Inc.*, [1993] OLRB Rep. June 540 and *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523 are distinguishable from this case. In *Premark, supra*, one of the two units combined was comprised of three employees. Geographically they were separate, but the community of interest between units was found to be similar and administratively, it made sense to combine the units avoiding unnecessary fragmentation. At Hudson's Bay, however, each of the units are comprised of several hundred employees. Leaving them as individual bargaining units, does not constitute fragmentation. In *Mississauga Hydro, supra*, the consolidation of bargaining units consisted of combining a unit that worked inside the facility with one that worked outside. Clearly, in that case there is not the same geographical concern as in Hudson's Bay because both Hydro units operate out of the same facility.

5. Finally, it seems to me that my colleagues have failed to recognize what the parties to the proceeding have achieved over the past number of years. There is little doubt that the existing bargaining units and the employer have acquired substantial stability and balance through past collective bargaining efforts. Surely this harmonious relationship is something that is encouraged rather than denied by the *Ontario Labour Relations Act*. Disruption by the Board of this equitable relationship between parties is plainly tantamount to tipping the scales of balance.

0688-93-R; 3786-92-G; 3586-92-R; 3038-92-G United Brotherhood of Carpenters and Joiners of America Local 785, Applicant v. **The Second Cup Ltd.**, and 953455 Ontario Limited, Responding Parties; United Brotherhood of Carpenters and Joiners of America Local 785, Applicant v. **The Second Cup Ltd.**, Responding Party; United Brotherhood of Carpenters and Joiners of America Local 249, Applicant v. **The Second Cup Ltd.**, and David and Janice Heasley, Responding Parties; United Brotherhood of Carpenters and Joiners of America Local 249, Applicant v. **The Second Cup Ltd.**, Responding Party

Construction Industry - Construction Industry Grievance - Related Employer - Remedies - Carpenters' union having collective agreement with franchisor - Franchisees entering into agreements with non-union contractors to perform certain renovation work - Board finding that franchisees and franchisor carrying on related activities under common control and direction - Board making single employer declaration, but limiting its application to renovations, including new store construction, agreed to between the responding parties

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

APPEARANCES: *N. L. Jesin* and *Dennis Grant* for United Brotherhood of Carpenters and Joiners of America, Local 249; *N. L. Jesin* and *Karl Ball* for United Brotherhood of Carpenters and Joiners of America, Local 785; *Robert MacDermid* and *Gary Fobert* for **The Second Cup Ltd.**; *David Heasley* for *David and Janice Heasley*; *Gerry Peskett* for 953455 Ontario Limited.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; October 7, 1993

1. These are applications under sections 1(4), 64 and 126 of the Ontario *Labour Relations Act*. Local 785 has brought an application under sections 64 and 1(4) against the Second Cup Limited (the "Second Cup") and 953455 Ontario Limited and an application under section 126 against Second Cup. Local 249 has brought an application under section 1(4) and 64 against Second Cup and David and Janice Heasley and an application under section 126 of the *Labour Relations Act* against the Second Cup. The applications under section 126 were filed with the Board first and the section 1(4) and 64 applications were filed after the Second Cup responded that the work about which the grievances were filed was not covered by the collective agreement because the stores in question are franchises.

2. David and Janice Heasley (the "Heasleys") are franchisees of a Second Cup retail store in the Cataraqui Mall in Kingston and Gerry and Elizabeth Peskett (the "Peskett") are the principals of 953455 Ontario Limited which is the franchisee of a Second Cup retail outlet in the Stone Road Mall in Guelph. On the first day of this hearing, Mr. MacDermid indicated he was representing all of the responding parties; however, on the second day of hearing, prior to the argument, the Heasleys and the Pesketts indicated their wish to represent themselves from that point forward.

3. Second Cup called Mr. Michael Martin, Manager of Design and Construction for Second Cup, as a witness, as well as David Heasley, Gerry Peskett, and Altom McEwen, the President of Second Cup. No witnesses were called by the applicants.

4. The evidence disclosed that the Heasleys and the Pesketts have been Second Cup franchisees for a number of years and that in 1992 their franchise agreements and sub-leases were up

for renewal. This was the first time that the Heasleys or the Pesketts had renewed their franchises. In 1991, Second Cup adopted two new design looks, using two companies which it required all of its franchisees to use to renovate their stores as a condition of renewing their franchise agreements. Both the Heasleys and the Pesketts entered into agreements with non-union contractors to perform the work.

5. It was agreed by all parties that the applicant unions have a collective agreement with Second Cup. The Second Cup became bound to the collective agreement with the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America on November 30, 1982. We heard no evidence as to whether the Second Cup used the union's members for any renovation as opposed to new store construction work subsequent to entering into that agreement, or whether "renovation work" was contemplated at the time that agreement was entered into.

6. Mr. McEwen described the Second Cup business as specialty coffee retailing. Of the 180 Second Cup stores in Canada, less than 5% are corporately owned and operated, the rest of the Second Cup stores are franchises. We heard evidence that the Second Cup franchises the "Second Cup system" to franchisees. The system involves purchasing the right to use the Second Cup trademarks and goodwill, sub-leasing space that the Second Cup has leased from landlords, using the Second Cup administration services, purchasing products from suppliers with whom the Second Cup has negotiated agreements, using the Second Cup systems of book-keeping, etc. The Second Cup "system" is described in the franchise agreement as follows:

(g) "*Franchisor's System*" means the system developed and/or used by the Franchisor, or which may hereafter be developed and/or used by the Franchisor, for the operation of a retail sales outlet specializing in the sale of specialty coffees, teas, baked foods, other beverages and coffee, tea and other related gift items and includes without limiting the generality of the foregoing:

(i) the distinguishing characteristics relating to the basic image, design, appearance, layout and colour scheme of the interior and exterior of the Premises;

(ii) the design, style, colour and other distinguishing characteristics of the fixtures, showcases, signs and furnishings;

(iii) the layout, design and selection of equipment;

(iv) the specifications used in preparing the Products for sale;

(v) the methods used for selecting, purchasing, marketing, displaying and selling the Products;

(vi) the standards of quality, service and cleanliness employed in the operation of a retail store outlet using the Franchisor's System.

7. The Second Cup can set maximum prices on products but the franchisee may determine what price the product is actually sold at. The franchisee determines staff and staffing levels. It is somewhat unclear whether hours of operation are determined by the franchisor or by the mall in which the retail outlets are situated. The Second Cup does quarterly inspections of all of its stores through its field consultants to ensure that they are up to Second Cup standards. The inspections include, among other things, inspecting the products sold, the knowledgeability of staff, and the book-keeping practices of the franchisee. The franchisee reports gross sales to the Second Cup weekly and makes more detailed reports on a monthly, quarterly and annual basis. Second Cup receives royalties on gross sales from the franchise as does the mall in which it is situated as part of the rental agreement. The Second Cup determines which suppliers the franchisee must purchase product from; however, the franchisees have some leeway, e.g. with respect to locally-baked goods, providing that they are at least of equal quality to those supplied by Second Cup suppliers.

and that they are approved by the field consultant. As part of the franchise agreement, the franchisee must devote 2% of its gross sales to advertising and must remit 1.5% of gross sales to Second Cup for a corporate advertising fund which Second Cup controls. The Second Cup negotiates a head lease with the mall and then sublets to the franchisee. All franchisees are required to successfully complete the course at Second Cup's "Coffee College". According to the franchise agreement, if a franchisee is unsuccessful in that course, the Second Cup can either take over the store or terminate the agreement. Staff in all franchise stores must wear Second Cup uniforms. Both the Second Cup and the landlord of the mall may require audits of the franchisee's books. The Second Cup may inspect the franchisee's books at any time and without notice and may also inspect premises, inventory and products. The franchisee determines the terms and conditions of employment of its employees.

8. The Second Cup's practice with respect to a new retail store is to enter into a lease with the landlord and sell the franchise to the franchisee. The Second Cup then has the store designed and constructed to its own specifications but the franchisee must pay the costs. In building a new store, the Second Cup uses union labour as per its contract with the Carpenters' Union. However, when an existing Second Cup store is to be renovated, the Second Cup allows the franchisee to choose to contract for the labour to perform the work. The franchisee is not required to use union labour. The explanation that was provided for the two approaches is that a new franchisee does not have the experience to build a store to Second Cup requirements; however, someone who has been in the business for five years or more would have the required experience.

9. As indicated above, when the Heasleys' and the Pesketts' franchise agreements came up for renewal, Second Cup required them to do full renovations on their stores. This was also required, however, by the malls in which they were situated. In fact, in at least one of the lease agreements, the landlord of the mall stipulated the approximate cost of the renovations which must be undertaken by the tenant. The Second Cup, as noted, contracted with two design companies to come up with designs for the renovations of its stores. It required the Heasleys and the Pesketts to adopt one of the two designs. Mr. Peskett testified that he contemplated using his own designer; however, he dropped the idea when he realized that Second Cup would have the final say in the design anyway and that it would be cheaper to use a Second Cup designer. It was undisputed that if a franchisee did use its own designer, the design would have to be consistent with that of the Second Cup designer. The design chosen by both the Heasleys and the Pesketts was created by the firm of Peter C. Cotton Inc. However, according to the lease agreements, the landlord of the malls also must give written approval for all repairs, alterations, replacements, decorations and improvements. The tenant in the Catarqui Centre lease must submit all drawings and specifications prepared by a qualified architect and engineers, and must use competent workmen whose labour union affiliation is compatible with others employed by the landlord and its contractors. However, we heard no oral evidence or argument with respect to this clause in the lease or with respect to the landlord's involvement in these renovations.

10. Mr. Martin administered the renovation process for Second Cup. He forwarded correspondence to the Heasleys and the Pesketts indicating that renovations would be required and that the Second Cup had purchased designs for the renovations of its stores. Second Cup required both the Heasleys and the Pesketts to forward \$10,500.00 to Second Cup to cover the costs of the store and electrical designs and the disbursements of the designers. This fee also included a \$1,000.00 administration fee for Second Cup. This money was placed in trust accounts and if there were any left after the process, it would be remitted to the franchisee. The designer, upon being advised of the store to be renovated, in the case of the Heasleys, went and inspected the store, but in the case of the Pesketts, used a floor plan that it had which was already up to date. Both the Heasleys and the Pesketts negotiated some changes to the original design.

11. Franchisees are given three options on how to proceed with their renovations. They may hire the Second Cup's construction department to administer the renovations, they may retain the designer to administer the renovations, or they may do so themselves. Both the Heasleys and the Pesketts chose to administer the renovations themselves, for cost reasons. The Second Cup's construction department provides the franchisees with a package of materials with respect to the renovations. Those materials include outlines of the process, as well as sample tenders, etc. Mr. Peskett testified, however, that he did not use those materials and Mr. Heasley testified that he departed from them significantly.

12. There was no dispute that the Second Cup had the right of approval of the designs chosen to be used in the stores, and to ensure that the store met Second Cup's specifications. The Second Cup provided the franchisees with a list of equipment which they must purchase or have refurbished in the renovation of the store, and the designs themselves included specific product and product suppliers from which materials had to be purchased. Those designs were required to be part of the contract with contractors retained to do the renovations. Nevertheless, Mr. Peskett testified that he in fact did not enter into any written contract, but that he arranged to have his store renovated on a handshake. However, he also testified that the plans were referred to in the original tender documents. The Second Cup sent both the Heasleys and the Pesketts a list of recommended or suggested contractors which they could use, some of which were unionized and some of which were not. The Second Cup required that if the franchisees elected to use another contractor, that they had to advise the Second Cup and provide it with the background and references of the contractor so that it could be approved to ensure that the work would be according to Second Cup standards. However, both Mr. Heasley and Mr. Peskett testified that they did not seek the approval of the Second Cup before retaining the contractors they used. The Second Cup also recommended that franchisees send copies of tenders to them, however, neither Mr. Peskett or Mr. Heasley did so. The Second Cup also set deadlines for when completion of the renovations must be complete, however, both the Heasleys and the Pesketts negotiated changes to those deadlines. In fact, we heard evidence from Mr. Peskett that he had quite protracted negotiations with the Second Cup with respect to his sub-lease and the date by which his renovations would be required.

13. While the renovations were being carried out by the Heasleys' and Pesketts' chosen contractors, neither the Second Cup nor the design company had any involvement or inspected the premises or supervised the work. Mr. Heasley and Mr. Peskett personally supervised the work of the respective contractors. Mr. Peskett testified that the Second Cup did telephone him a few times to see if things were on schedule. There was some evidence that the CEO of the Second Cup, Mr. Michael Bregman, was concerned about the delay with respect to the Peskett renovations. Although the franchise agreement required the franchisee to send Second Cup copies of all invoices with respect to the renovations, neither the Heasleys nor the Pesketts did so.

14. The franchise agreement between the Second Cup and the franchisees was acknowledged by all parties to be a very strict one. The agreement included many stipulations that the franchisee must follow and the franchisor has wide discretion to terminate the agreement. In his evidence, Mr. McEwen testified as to the reason for this strict contractual arrangements. He testified: "They appear to be one-sided. That is for the protection of the systems and the other franchisees. If one of the franchisees were acting in a manner to hurt the image, the franchisor needs to be able to go in and deal with it". The franchise agreement provides, in part, as follows:

The franchisee acknowledges that the foundation of the Franchisor's System and the essence of this agreement is the adherence by the Franchisee to the standards and policies of the Franchisor's System including but not limited to, serving only designated Products, using only prescribed building and equipment layouts and designs, and strictly adhering to the designated specifications for the Products and to the prescribed standards of quality, service and cleanli-

ness. Further, the establishment and maintenance of a close personal working relationship with the Franchisee in the conduct of the Business, the accountability of the Franchisee for the performance of the Franchisee's obligations contained in this agreement and the Franchisee's adherence to the Franchisor's System also constitute the essence of this agreement. Accordingly, in accepting the grant referred to above, the Franchisee agrees that the provisions of this agreement shall be interpreted to give effect to the intent referred to above so that the Business shall be operated in conformity with the standards and policies of the Franchisor as they now exist or as they may be modified from time to time.

15. In cross-examination, Mr. Heasley testified as to why he entered into a Second Cup franchise. He testified that he had watched the company for a few years and thought it was a good franchise, that the name was important, as well as the concept, the looks and everything, and he agreed that he was not just going into the coffee business but going into the Second Cup business. Mr. Peskett also testified that he entered the Second Cup franchise because he liked the Second Cup system. In cross-examination, Mr. Peskett also testified that he did not want to have a store with his own design, that he used the Second Cup trademark and their goodwill which he himself helped to build, and that he was part of the Second Cup team. However, it was clear that both Mr. Peskett and Mr. Heasley consider themselves to be independent business people.

16. On behalf of the Second Cup, Mr. MacDermid argued that the franchisor and the franchisees did not carry on a related business. He argued that the Second Cup is in the business of selling franchises to third parties and that the franchise "package" consists of what is described as the "get up" of the store; manuals on the look and image of the store, managing and running the store, and also of the lease negotiated by Second Cup which a franchisee takes as a sub-lease. According to Mr. MacDermid, the Second Cup does not sell coffee and tea. The two franchisees, on the other hand, are in the business of selling coffee, tea, cocoa, muffins, etc. The Second Cup is just providing services to the franchisees. Mr. MacDermid argued that the fact that the Second Cup gets paid a piece of the franchisee's sales is typical of any franchise agreement, but that the franchisees themselves are entrepreneurs in the business of selling a product.

17. Mr. MacDermid argued that we should not just look at the franchise agreement which he conceded was a very strict one, but that we must look at the actual relationship between the parties. He argued that the agreement is there for the day you have to "fight", but that there was no "fight" in these cases. He also argued that the purpose of Second Cup's control is to maintain the consistency of the product to everyone's mutual benefit, but that in reality, the Pesketts and the Heasleys are only visited by Second Cup representatives four times a year to see what they are doing, and to give them advice and counsel. Thus, he contended that the Second Cup does not have hands on control. Mr. MacDermid pointed out that the mall required the renovations to be done and that the Second Cup's design requirements were really a service it provided to its franchisees, which is why a payment was required, but that the franchisees were able to negotiate changes to the designs. He noted that both the Heasleys and the Pesketts supervised the construction projects themselves. The Second Cup did not provide any services with respect to the actual construction. Counsel for Second Cup argued that on the facts, based on the reality of the relationship between these parties, there is no common direction or control.

18. Second Cup also argued that there were no sound industrial relations reasons for granting a declaration under section 1(4) of the Act. Counsel argued that the franchisees were small business people and that a 1(4) declaration would put an obligation on Second Cup to add a requirement to use union contractors in the franchise agreement. Mr. MacDermid referred us to the Board's decision in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214 which he argued was distinguishable from the facts before us.

19. Mr. MacDermid also argued that a sale of a business had not occurred here. He noted

that the Heasleys' franchise had been in existence prior to Mr. Heasley's purchase and that the Second Cup has no construction business. He argued that if the Second Cup is actually building a store, they tender to a general contractor who does the construction and that it continues to operate in this way and therefore has not "sold" part of its business.

20. Mr. MacDermid argued with respect to the grievances that the stores belonged to the Heasleys and the Pesketts, that the obligation to renovate is found in their sub-lease, that it is not Second Cup's obligation to renovate and that it does not pay the cost of the renovations. The Second Cup is therefore not subcontracting and is not in breach of Article 4.01 of the collective agreement. Mr. MacDermid also argued that this situation was not covered by Article 4.03, the "construction management" provision of the collective agreement.

21. Mr. Peskett argued that he had never witnessed the "use or abuse" of the franchise agreement by head office unless a store was blatantly operating against standards, and that the interdependency of the franchisee and the franchisor is the same as that between the franchisee and the customer, that one cannot exist without the other. Mr. Heasley argued that he considered himself an independent businessman, that Second Cup and he are separate entities and that Second Cup has no on-site control.

22. It was the applicants' position that Second Cup exercises fundamental control over the construction work done in these renovations such that it is really Second Cup's work and Second Cup has therefore breached Article 4.01 by subcontracting it to employers not bound by the collective agreement.

23. With respect to Article 4.03, Mr. Jesin noted that "construction management" has been a very controversial labour relations issue for many years and referred us to the Board's decision in *Dalton Engineering & Construction Limited*, [1988] OLRB Rep. June 567. Mr. Jesin argued that 4.03 applied to this situation because the franchise agreement was, among other things, a contract for the renovation of a store, that the Second Cup in this case was in a sense the owner of the premises in that they have contracted in the franchise agreement with the franchisee for the renovation of the premises, and that therefore the franchisee is renovating premises which belong to the Second Cup on behalf of the Second Cup. Mr. Jesin also argued the reverse, that we could find that the Second Cup was providing construction management services for the franchisee since the Second Cup gets the design going and recommends contractors. The union argued that, just like in a "normal" construction situation, the owner (franchisee) is not bound to take the recommendation, and that this is no different from any other construction management situation. He argued that in these circumstances Second Cup could be seen as contracting for services or providing inspection services, etc. so that it is caught either by Article 4.03 or 4.01 of the collective agreement.

24. Mr. Jesin argued alternatively that Second Cup and the franchisees are related businesses under section 1(4) of the *Labour Relations Act*. He claimed that the franchisees were not just going into the retail business, they were going into the Second Cup system. He argued that the Second Cup is not in the business of selling franchises, it is in the business of selling coffee, that Second Cup is a middleman, it buys coffee for the corporate stores, makes deals and has approved lists of suppliers for the franchisee. He agreed that on a day to day basis Mr. Peskett and Mr. Heasley were running the store, but that the Second Cup retains control because it receives 9% royalties on the gross sales and because it wants to protect its name. He argued that the parties are therefore in a related business which is the sale of coffee. Mr. Jesin also argued that we cannot look at this relationship without looking at the franchise agreement, and that the best evidence of the relationship is in that contract. Mr. Jesin also argued that on all of the facts, Second Cup clearly had direction

and control of the franchises and that putting a "generous gloss" on it would be to say that the parties were in fact partners for labour relations purposes. Mr. Jesin relied on *Penmarkay, supra*, and on *RPKC Holding Corporation*, [1986] OLRB Rep. June 828.

25. With respect to the section 64 application, Mr. Jesin argued on behalf of the union that the Second Cup is an employer in the construction industry and bound by the collective agreement because it builds its own stores and franchises in accordance with the collective agreement. When it comes time to renovate, however, it dictates what the store must look like, but allows franchisees to do the renovations themselves as long as they do it the way Second Cup tells them. Mr. Jesin argued that this was a transfer of part of a construction business.

26. The relevant provisions of the *Labour Relations Act* are as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

* * *

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

• • •

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in

the same position in respect of the business as if the successor employer were the predecessor employer.

27. The relevant sections of the collective agreement are as follows:

ARTICLE 4 - SUBCONTRACTING

4.011c2 Any work that is the work of the Union under the provisions of Article 19 of this Agreement shall only be contracted or subcontracted to an employer bound by this Agreement.

4.02 Violation of this Article shall be subject to grievance and arbitration notwithstanding any reference of any jurisdictional dispute to any tribunal over the same work.

4.03 Construction Management - Without restricting in any way the application of the subcontracting provision contained in Article 4.01 of this Agreement, an Employer who undertakes a contract with an owner to provide construction management services shall be subject to said Article 4.01 unless:

(i) The owner selects contractor(s) not bound to this Agreement to bid on work covered by this Agreement and solely and directly solicits or obtains bid(s) for such work from such contractor(s) without any involvement or participation by the Employer in the selection of such contractor(s) (except as to the validity of the bid(s)) or the solicitation or obtaining of any bid(s) from any contractor(s) regardless of whether it (they) is (are) bound or otherwise to this Agreement.

(ii) The owner accepts bid(s) from contractor(s) not bound to this Agreement; and

(iii) The owner contracts or subcontracts directly with contractor(s) not bound to this Agreement without contractual obligation of the Employer for the work of such contractor(s), other than for the negligent acts or omissions of the Employer.

4.04 Any failure to comply with Article 4.03 of this Agreement shall render the employer liable for damages equivalent to those for the breach of the subcontracting provision set forth in Article 4.01.

4.05 The employer shall advise the owner of the provisions of Articles 4.03 and 4.04 when undertaking the construction management service contract.

ARTICLE 5 - UNION SECURITY

5.01 (a) The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Brotherhood of Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

(b) Except as modified by the provision of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set out in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

(c) It is understood that, if the Local Union or District Council is unable to provide the required manpower within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

(d) As a condition of continuing employment, all employees must maintain membership in good standing in the Union.

Article 19 refers to the work jurisdiction of the union. There was no dispute that the work done on the renovations of these two stores would be within the jurisdiction of the union in the event that the work was covered by the collective agreement.

28. This is the first time the Board has been asked to consider the application of sections 1(4) and 64 of the *Labour Relations Act* in the context of a franchise in relation to the construction industry. Non-construction industry cases in which the Board has considered the application of these sections in the context of a franchise agreement are in the decisions cited by the parties: *Penmarkay Foods Ltd.* and *RPKC Holding Corporation*, *supra*.

29. In determining whether to treat two entities as one employer for the purposes of the *Labour Relations Act* under section 1(4), the Board must consider whether the activities or businesses are associated or related, as well as whether they are under common control or direction. If the answer to the first two questions is "yes", we must then consider whether this is an appropriate case in which to exercise our discretion to treat the parties as constituting one employer for the purposes of the Act.

30. We have carefully considered the submissions of the parties and have determined that this is an appropriate case to exercise our discretion under section 1(4) to treat the parties as constituting one employer for the purposes of the *Labour Relations Act*. The businesses of the Second Cup and those of the Heasleys and the Pesketts respectively are associated and related. The Second Cup is in the business of leasing franchises as well as in the business of profiting from the sale of coffee, tea etc. The Heasleys and the Pesketts are in the business of being franchisee lessees to profit from the sale of coffee, tea etc. The extensive evidence we heard about the Second Cup system and the franchisees' participation in it, indicates that all parties perceived themselves to be part of an associated undertaking and business.

31. We also find that the franchise businesses are under common direction and control of the Second Cup and the Heasleys or the Pesketts. The franchise agreement itself establishes that Second Cup has fundamental control over the way the franchisees conduct their businesses. Furthermore, the Second Cup directs and controls the renovation work which was performed on the stores as it was the Second Cup's decision that the renovation work must be done. The Second Cup also determined the extent of the renovation work, the design that the work was to follow, the materials to be used, and the timetable by which the renovation must be completed. The Second Cup had final approval of the work once completed. Furthermore, the Second Cup contracts the construction work on new stores itself and could at any time require franchisees to use contractors bound by the collective agreement just as it had the power to approve or not approve any sub-contractor chosen by a franchisee to do the renovation work. All of these facts plus the other elements of Second Cup control outlined in the previous paragraphs lead to the conclusion that the franchise business of the Heasleys and Pesketts is under common direction and control with that of Second Cup. We note that the franchise agreements in this situation are very similar to the franchise agreements in *Penmarkay Foods Ltd.* and *RPKC Holding Corporation*, *supra*. In a practical sense, one can fairly conclude that the business is being carried on together by the responding parties. This aspect is often, as it is here, part and parcel of franchise arrangements.

32. Are there then labour relations reasons why we should or should not exercise our discretion to treat these parties as constituting one employer for the purposes of the *Labour Relations Act*? The Second Cup argued that there is a distinction between the renovation work performed on these stores and the construction of new stores which it has admitted is work covered by the collective agreement. However, there is nothing in the language of the collective agreement between these parties nor in the evidence, of past practice, to suggest such a distinction. The unions have

contracted with the Second Cup to perform construction carpentry work on Second Cup stores. The renovation work performed on these stores is not materially different from the work performed on new stores.

33. When we look at the overall operation or business between Second Cup and the two franchisees, we see an associated or related activity carried on together, under common direction and control. Second Cup, the franchisor, was certified for the construction work of carpenters. Given the collective agreement language and the evidence, this includes work of the sort in question. Second Cup ought not, in these circumstances, to escape its collective agreement obligations, through the use of a different corporate entity to perform the work in question. This is precisely what section 1(4) is for, to ensure that existing bargaining rights are not lost, or diminished, because of a change in the legal entity, where the entities in question are carrying on related activities under common direction and control. (See, for example, *Widcor Limited*, [1989] OLRB Rep. Jan. 66.)

34. Here, it is clear that the conditions precedent have been met, and that the issuance of the 1(4) declaration is appropriate, for to decline to so declare would effectively nullify the bargaining rights of the Carpenters, as reflected in the current collective agreement. Accordingly, the declaration will issue.

35. At the same time, the declaration ought only to preserve existing bargaining rights, and not extend the bargaining rights of the applicant. A declaration unlimited in scope would hold, for purposes of the *Labour Relations Act*, that the responding parties are to be treated as a single employer. Given the construction industry context, the circumstances at hand, and the evidence before us, it is not appropriate to issue a declaration that would treat these parties as a single employer with respect to all carpentry work in the stores in question. For example, if the Heasleys have a shelf built, or a new door attached, it is not apparent that the collective agreement would cover this, or that a 1(4) declaration ought to issue holding the Second Cup liable for such work.

36. Therefore, we will exercise our discretion to issue a 1(4) declaration, but it will apply only to the renovations, including new store construction should that occur, agreed to between the responding parties. The Board adopted a similar approach in *Widcor Limited*, *supra*:

39. The making of a section 1(4) declaration has the effect of treating two corporate entities as constituting *one* employer for purposes of the Act. A section 1(4) declaration without qualification therefore would have the effect that the applicant union has bargaining rights for *both* Green King and Widcor. Both will be bound by the provincial ICI collective agreement and as *one* employer, presumably each would be liable for any violations of that collective agreement or any violations of the *Labour Relations Act*. This would be so regardless of the fact that perhaps, in fact, only one legal entity was the "culprit" who violated the collective agreement or the Act. That result normally flows quite logically from a finding that two separate legal entities are under common direction or control. Where, as here however, the common direction or control comes from a unique set of circumstances relating specifically to the construction of a car dealership at the Dixie auto campus, and not from such traditional indicia as common directors, common shareholders, common officers, etc., the aforementioned results appear to be somewhat less logical. At present Widcor does not operate a business in the construction industry. It is a land developer and is in the midst of "setting up some money market and bond market operations". In the present circumstances it would be anomalous if, by reason of Widcor's construction venture in respect of the Chrysler dealership, Widcor is indefinitely responsible or accountable for the ongoing construction business of the general contractor which it engaged on that project. Obviously, and as acknowledged by Mr. Wharton, if at some time in the future Widcor itself again operates a business in the construction industry, Widcor continues to be bound to recognize the bargaining rights which the applicant trade union has acquired, and continues to be bound to any collective agreement then in force. Conversely, as Widcor has no other direction or control in respect of Green-King's construction business (other than the specific, joint

direction or control that it shared with Green-King in respect of the construction of the Chrysler dealership), then although the section 1(4) declaration is intended to, and has the effect of protecting the bargaining rights which the union has acquired in respect of Widcor, the section 1(4) declaration also has the effect of extending those bargaining rights to encompass Green-King wherever and whenever it operates in the construction industry. In the circumstances of this case that result appeared to the Board to be equally incongruous. As the Board has broad discretion and remedial powers (as specifically noted in the concluding words of section 1(4) which grants the Board the power to "grant *such* relief, by way of declaration or *otherwise, as it may deem appropriate*") during the course of argument, we suggested to the parties that an appropriate declaration to be made was a declaration limited to protecting the applicant's bargaining rights to those instances where Green-King and Widcor together engage in working in the construction industry as ultimately set out in our decision of November 4, 1988. Counsel for the union and Mr. Wharton on behalf of Widcor both indicated that they would have "no problem" with the Board making such declaration. Mr. Barclay did not comment on the matter.

37. The collective agreement therefore applies to all of the responding parties. In this case, there was no question that the type of work performed was within the jurisdiction of the union. Since the work on these two stores was contracted or subcontracted to employers not bound by the collective agreement, the responding parties have breached Article 4.01.

38. We therefore find that the Second Cup Ltd., and 953455 Ontario Limited are one employer for the purposes of the *Labour Relations Act*, but only in those instances where 953455 Ontario Limited engages in work described in the collective agreement which it is required to perform by or agrees to perform with Second Cup. We also find that the Second Cup Ltd. and David and Janice Heasley are one employer for the purposes of the *Labour Relations Act*, but only in those instances where the Heasleys engage in work described in the collective agreement which it is required to perform by or agrees to perform with Second Cup. We also find that there has been a breach of Article 4.01 of the collective agreement since the work performed on these stores was not performed by contractors or subcontractors bound to the collective agreement.

39. Under the circumstances, we find it unnecessary to decide the application of section 64 of the *Labour Relations Act*, nor need we decide whether there has been a breach of Article 4.03 of the collective agreement.

40. We remain seized with respect to any remedy in this matter as requested by the parties.

DECISION OF BOARD MEMBER D. A. MACDONALD; October 7, 1993

1. I do not agree with my colleagues that the Board should exercise its discretion and issue a declaration that the franchisees and franchisor are associated and under common control with respect to alterations to stores on lease renewals.

2. In my view, the franchisees act independently of the franchisor (Second Cup) in the selection and supervision of contractors.

3. I would have dismissed this application.

COURT PROCEEDINGS

1700-93-U; 1701-93-M (Court File No. 626/93) Associated Contracting Inc., Applicant v. The Queen in Right of Ontario (Minister of Labour), The Ontario Labour Relations Board and International Union of Operating Engineers, Local 793, Respondents

Abandonment - Bargaining Rights - Conciliation - Construction Industry - Evidence - Judicial Review - Strike - Employer asserting that threatened strike unlawful on ground that union had previously abandoned bargaining rights - Threatened strike following timely "notice to bargain", appointment of conciliation officer and issuance of "no board" report - Board declining to inquire into continued existence of bargaining rights in circumstances of this case - Board also not accepting employer's assertion that threatened picketing by union improperly motivated and, therefore, unlawful - Application dismissed - Employer applying for judicial review and seeking to have matter heard before single judge on grounds of urgency - Court not satisfied that matter "urgent" and transferring application to Divisional Court

Board decision reported at [1993] OLRB Rep. Nov.

Ontario Court of Justice, Southey J., October 5, 1993.

Southey J. (endorsement): I am not satisfied that the consequences referred to in para. 17(b)(i) of Mr. Thornton's affidavit give rise to a situation of urgency within the meaning of s. 6(2) of the *Judicial Review Procedure Act*, or that the delay required for an application to the Divisional Court will render nugatory a decision of that Court in favour the employer. The matter is transferred to the Divisional Court. Costs will follow the event before me. Only the Union asks for costs, and I fix those costs at \$2,000.

2241-86-R (Court File No. 22355) Ontario Hydro, Appellant v. Ontario Labour Relations Board, the Society of Ontario Hydro, Professional and Administrative Employees, Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000, the Coalition to Stop the Certification of the Society on Behalf of Certain Employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, Respondents and The Attorney General of Canada, Respondent and The Attorney-General for Ontario, the Attorney General of Quebec and the Attorney General for New Brunswick, Interveners

Certification - Constitutional Law - Judicial Review - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s. 18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour Code* applies to Hydro employees employed at nuclear facilities coming under s.18 of the *Atomic Energy Control Act* - Supreme Court of Canada dismissing appeal and confirming order of Court of Appeal reinstating decision of Ontario Labour Relations Board

Board decision reported at [1988] OLRB Rep. Feb. 187; Divisional Court decision reported at [1989] OLRB Rep. June 698, 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC 14,014; Court of Appeal decision reported at [1991] OLRB Rep. Jan. 115, 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC 14,014.

Supreme Court of Canada, Lamer C.J., and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. September 30, 1993.

Reasons for judgment by La Forest J. concurred in L'Heureux-Dubé and Gonthier JJ.

Concurring reasons by Lamer CJ.

Dissenting reasons by Iacobucci J. concurred in by Sopinka and Cory JJ.

LA FOREST J.: The issue in these appeals is whether the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, or the federal Act, the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally applies to govern the labour relations between Ontario Hydro and its employees at Hydro's nuclear electrical generating stations.

Background

Ontario Hydro, a provincially owned corporation established for the purpose of generating and distributing electric power, produces electric power through 81 electrical generating stations of which five are nuclear generating stations. The Society for the Ontario Hydro Professional and Administrative Employees applied for certification pursuant to the Ontario *Labour Relations Act* as exclusive bargaining agent for a unit of employees of Ontario Hydro, including those employed at the nuclear plants. Another group of employees, the Coalition to Stop the Certification of the Society, challenged the application on the ground that the employees who worked at the nuclear generating stations fell within the jurisdiction of the Canada Labour Relations Board established under the *Canada Labour Code*. The Ontario Labour Relations Board held it had no jurisdiction to certify the bargaining unit in the Society's application because the unit included employees who worked at the nuclear generating station, which in its view were governed by the *Canada Labour Code*: [1988] OLRB Rep. Feb. 187. This decision was quashed by the Ontario Divisional Court (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC 14,014, but was reinstated by a majority of the Ontario Court of Appeal (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC 14,014. Leave was sought and granted to appeal to this Court, [1993] 3 S.C.R. x. The Chief Justice stated the following constitutional question:

Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s.18 of the *Atomic Energy Control Act*, R.S.C. 1985, c. A-16?

As in the courts below, those who supported federal jurisdiction relied on Parliament's power to declare works, although wholly situate within a province, to be for the general advantage of Canada (ss.92(10)(a) and 91(29) of the *Constitution Act, 1867*), and its general power to legislate for the peace, order and good government of Canada in the opening words of s.91 of that Act. I note that all works and undertakings constructed "for the production, use and application of atomic energy" were declared works for the general advantage of Canada by s.18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16, and none of the parties contests that Ontario Hydro's nuclear facilities fall within the ambit of the declaration. The appellants argue, however, that this does not bring within Parliament's jurisdiction the labour relations at those facilities, about which

it has purported to legislate under the *Canada Labour Code*, which by the combined effect of ss. 2(h) and 4 applies to works and undertakings within the legislative authority of Parliament, including works declared to be for the general advantage of Canada.

Those who supported provincial jurisdiction relied on the province's traditional power under s. 92 of the *Constitution Act, 1867* to exclusively make laws in relation to local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and matters of a merely local or private nature (s. 92(16)), but they placed special reliance on s. 92A(1) (enacted by the *Constitution Act, 1982*, s. 50), which empowers the provinces to exclusively make laws in relation to non-renewable natural resources, forestry resources, and electrical energy, and specifically on s. 92A(1)(c), which reads as follows:

92A. (1) In each province, the legislature may exclusively make laws in relation to

...

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Ontario Hydro, while conceding that it was not a Crown agent, also argued that it should be immune from federal regulation because it was a provincial instrumentality set up to advance provincial purposes.

Justice Iacobucci (who fully sets forth the facts, judicial history and relevant legislation) is of the view that Parliament has exclusive jurisdiction under its declaratory power and the general power under s. 91 of the *Constitution Act, 1867* over some aspects of the nuclear generating facilities, but that the control of labour relations at these facilities is not integral to Parliament's effective regulation of these facilities, and in consequence are governed as a provincial matter under the *Labour Relations Act*. The Chief Justice, on the other hand, is of the view that the power to regulate the labour relations of those employed at these facilities for the production of nuclear energy is integral to Parliament's declaratory and general power. For the reasons that follow, I agree with the conclusion reached by the Chief Justice. In my view, the regulation of the labour relations of employees engaged in the production of nuclear energy falls within the exclusive powers granted to Parliament under the combined effect of the opening and closing words and head (29) of s. 91, and s. 92(10)(c) of the *Constitution Act, 1867*. I shall first discuss the declaratory power.

The Declaratory Power

Section 92(10)(c) of the *Constitution Act, 1867* authorizes Parliament to declare local works (which by s. 92(10) would otherwise fall within provincial power) to be for the general advantage of Canada. When such a declaration is made, any work subject to the declaration falls, by virtue of s. 91(29), within the legislative jurisdiction of Parliament. The effect of the declaration is the same as if such work was expressly enumerated in s. 91; see *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333, at p. 342. This is scarcely surprising. The opening and closing words of s. 91 make it clear that (notwithstanding anything in the Act) Parliament's exclusive legislative authority extends to such classes of subjects as are expressly excepted from the provincial enumeration of powers, including, of course, those specified in s. 92(10)(c); see also *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 (*Bell Canada 1966*), at pp. 771-72, per Martland J. for the Court. A work subject to a declaration thus falls within the exclusive legislative power of Parliament, and provincial jurisdiction over the work is ousted; see *Wilson v. Esquimalt and Nanaimo Railway Co.*, [1922] 1 A.C. 202, at p. 207. Laws of general application in the province (such as taxation) will, of course, apply to the work, but these cannot touch an integral part of Parliament's jurisdiction over the work. The province cannot legislate respecting the work *qua*

work. As early as 1899, the Privy Council made it clear that classes of subjects expressly excepted from the enumeration of provincial subjects of provincial legislative power (which, of course, includes works subject to a declaration) included the power not only to construct, repair and alter such a work but its management as well; see *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, at pp. 372-73.

The law on the matter has not really changed since then, though it has been subjected to considerable elaboration. Thus, as Iacobucci J. notes, recent authorities underscore that federal jurisdiction over declared works includes jurisdiction to regulate their operations; see *Chamney v. The Queen*, [1975] 2 S.C.R. 151, at p. 159; see also *The Queen v. Thumler* (1959), 20 D.L.R. (2d) 335 (Alta. S.C., App. Div.), at p. 341. A declaration incorporates a work as a functioning unit; in Laskin's words, the declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character"; see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 629. For my part, I am at a loss to see how one can have exclusive power to operate and manage a work without having exclusive power to regulate the labour relations between management and the employees engaged in that enterprise. That is what this Court has repeatedly stated; see *Bell Canada 1966*, *supra*; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 (*Bell Canada 1988*), exp. at pp. 839-40. As Beetz J. put it in the latter case, "these are two elements of the same reality" (p. 798).

In my view, most of the issues raised in this case have been fully disposed of by Beetz J. in his characteristically clear and thorough manner in the *Bell Canada 1988* case and its companion cases in the 1988 trilogy (*Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897), but it seems necessary, in light of the argument, to draw attention to those parts of his analysis specifically relevant here. I begin by noting that in the *Bell Canada 1988* case, at p. 825, he approved what he described as the classic statement on the subject by Abbott J. in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the "Stevedores case"), at p. 592, which reads as follows:

The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures. [Emphasis added by Beetz J.]

I should observe that Beetz J. had earlier very generally described "working conditions" for the purposes of the trilogy as including the conditions of work settled by contracts of employment or collective agreements. As he put it, at pp. 798-99: "working conditions are conditions under which a worker or workers, individually or collectively, provide their services, in accordance with the rights and obligations included in the contract of employment by the consent of the parties or by operation of law, and under which the employer receives those services".

It is argued, however, that *Bell Canada 1988* and other earlier cases were confined to "undertakings" in s. 92(10)(a) and (b) and not to works in s. 92(10)(c). Simply put, I cannot accept this. I have already observed that the *Bonsecours* case in its terms applied to all the exceptions in 92(10). And that is true of several of the cases relied upon by Beetz J. in *Bell Canada 1988*. Thus in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (cited in *Bell Canada 1988*, at p. 820), Ritchie J. stated at p. 181 that "it has been established that it is not within the competency of a provincial legislature to legislate concerning industrial relations of persons

employed in a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada” (emphasis added). Similar statements may be found in the *Stevedores* case, *supra*. Thus Fauteux J., at p. 585 (cited in *Bell Canada 1988*, at p. 825) spoke of “labour operations within this limited field of works, undertakings and businesses as to which the regulation by law is, under the *B.N.A. Act*, committed to the legislative authority of Parliament”. Beetz J. in *Bell Canada 1988*, at pp. 830-31, like Martland J. before him in *Bell Canada 1966*, at pp. 774-75, also relied on Duff J.’s statement in *Reference re Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505, at p. 511, regarding the federal powers of regulation touching the employment of persons on works or undertakings.

Beetz J. himself makes it clear on at least three occasions (pp. 761-62, 816-17 and 820) that despite the fact that labour relations ordinarily fall within s. 92(13) of the *Constitution Act, 1867* (his “proposition two”) that is not so of works or undertakings legislative jurisdiction over which is vested in Parliament. He says at pp. 761-62:

Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a, b, and c. of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking. [Emphasis added.]

I emphasize that Beetz J. there includes s. 92(10)(c), i.e., declared works among those undertakings subject to exclusive federal power. And he continues in the next paragraph (at p. 762):

It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction. ...[emphasis added.]

I underline that in the last line of this statement Beetz J. explains that provincial laws cannot apply to matters specifically of federal jurisdiction, and that in the previous paragraph he had unequivocally asserted that labour relations are an integral part of Parliament’s primary and exclusive jurisdiction over matters covered by, *inter alia*, s. 92(10)(c) “declared works”.

These statements are scarcely surprising. As I noted earlier, the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management. And as I recently noted in *Re Canada Labour Code*, [1992] 2 S.C.R. 50, at p. 78, inevitably “labour relations tribunals impinge upon powers that have traditionally been considered to be management prerogatives”. Labour relations are integral and vital parts of the operation of a work. There is no room for mutual modification of federal and provincial power. A province undoubtedly has power by general legislation to affect the operation of a declared work, but legislation governing labour relations on such works is legislation in relation to that work and falls outside provincial legislative competence; see the reasons of Pratte J.A. (Stone J.A. concurring) in *Shur Grain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1991] 2 F.C. 3, at pp. 35-37, and the other

Federal Court of Appeal cases there cited. Labour relations are an integral part of Parliament's exclusive power to legislate in relation to declared works. No evidence is required to establish this.

I add in passing that the current goals of labour relations, upon which my colleague Iacobucci J. places considerable stress, have nothing to do with the source of the legislative power. As I understand it, he argues for provincial power over labour relations from what he perceives to be the primary purpose of labour relations, i.e., the preservation of industrial peace and empowerment of workers. The provinces undoubtedly have a direct interest in such goals in furtherance of their general jurisdiction over property and civil rights, but this general power must give way in specific areas exclusively assigned to the federal Parliament, specifically in relation to federal works, i.e., works falling within federal legislative competence. In legislating on labour relations in this area, Parliament is engaged in regulating the work. In doing so, it may adopt, and indeed, has adopted legislation similar to provincial legislation. But this it does under its legislative power to manage and control the work, and this, of course, affects property and civil rights. The fact that Parliament in operating and controlling federal works adopts labour relations policies that are similar to policies adopted by the provinces does not make these policies fall within property and civil rights within s. 92(13). Beetz J. made it clear that the regulation of labour relations in the exercise of a federal power constitutes an exception to the general provincial power to legislate on the matter as property and civil rights in the province.

It is not necessary for me to engage in a consideration of the possible difference in scope between "undertakings" and "works" for the purposes of the various items in s. 92(10). I mentioned earlier that a work under s. 92(10)(c) means a work as a going concern, and to manage that going concern Parliament must have power to regulate the labour relations between management and labour engaged in operating the work. I see no logical or practical difference in the need for control of the labour relations in the management of an undertaking and in the management of a work as so understood. In that sense, a work is an undertaking, an undertaking, however, that must include a work. Rand J. in the *Stevedores* case, *supra*, at p. 553, appears to have had this idea in mind in the following statement:

The former [i.e., declared works], so far as the works themselves are likewise undertakings, would be such as yield some mode of service of a public or quasi-public nature. I see no distinction to be made between them and dominion works and undertakings generally. Undertakings, existing without works, do not appear in 92(10)(c) and cannot be the subject of such a declaration.

This would appear to have been the sense in which Beetz J., in *Bell Canada 1988*, referred to undertakings in s. 92(10)(c) because he knew, of course, that that provision referred to works only. As well, we saw, he relies on numerous statements that refer to both works and undertakings.

In this context, I note that s.18 of the *Atomic Energy Control Act*, *inter alia*, makes both "works and undertakings ... for the production, use and application of atomic energy" subject to the declaration. This probably was meant to include matters necessary to the operation of a nuclear facility, and as such would be superfluous. Certainly, it was not meant to cover the whole of the undertaking of Ontario Hydro. The declaration is confined to facilities constructed for the production, use and application of atomic energy, not to those constructed for the production of electrical energy by other means. The precise determination of which persons are employed in one type of facility or the other may, no doubt, give rise to problems of categorization. That issue is not, however, before us, we have no evidence on it, and I refrain from commenting on the matter.

Specific Arguments

What has already been said is sufficient to dispose of this aspect of the case but I shall attempt to respond to a number of specific arguments made by the appellants.

It was argued that the declaratory power must be read narrowly to make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists. It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. That is clearly set forth in the statement of Duff J. in *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, at p. 220, cited by Iacobucci J., at p. 23 of his reasons. This is scarcely an isolated statement. Mignault J. had expressed the same thought in at least as strong terms in the following passage in *Luscar Collieries Ltd. v. McDonald*, [1925] S.C.R. 460, p. 480:

The power conferred on Parliament to declare that works wholly situate within the province are for the general advantage of Canada or for the advantage of two or more of the provinces, is obviously a far-reaching power. Parliament is the sole judge of the advisability of making this declaration as a matter of policy which it alone can decide. And when the power is exercised in conformity with the grant, it vests in Parliament exclusive legislative authority over the local work which it removes from the provincial to the federal field of jurisdiction.

There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary. It might, I suppose, have been possible to interpret s. 92(10)(c) so as to confine it to works related to communications and transportation such as those specifically listed in s. 92(10)(a) and (b) but the courts, including this Court, have never shown any disposition to so limit its operation, and a wide variety of works - railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munition factories - have been held to have been validly declared to be for the general advantage of Canada. I note that neither the Chief Justice nor Iacobucci J. have any doubt about this.

The restricted view advanced here for the first time appears to be based on the danger thought to be posed to the structure of Canadian federalism if the courts do not confine federal power in this area. To begin with, I fail to see how abstracting from Parliament the power to regulate labour relations (which I have observed is necessary for the proper management of a work), while leaving all other regulation of the work to the federal government, does much to advance the federal principle. And I scarcely see the logic of having labour relations in federal undertakings fall within federal legislative power, but not labour relations in federal works. But more fundamentally I think the argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution.

I should first of all observe that the declaratory power is not the only draconian power vested in the federal authorities. The powers of disallowance and reservation accorded the federal government by ss. 55-57 and 90 of the *Constitution Act, 1867* give it unrestricted authority to veto any provincial legislation; see *Wilson v. Esquimalt and Nanaimo Railway Co.*, *supra*, at p. 210; see also *Reference re Disallowance and Reservation*, [1938] S.C.R. 71. The exercise of this authority is wholly a matter of discretion for the federal government, and in the Reference case just noted, it was stated that the courts are not constitutionally empowered to express an opinion about its exercise (see p. 95); for a similar statement regarding the declaratory power, see *The Queen v. Thumfert*, *supra*. The declaratory and veto powers were frequently used in tandem in the early years following union to accomplish the original constitutional mandate by establishing the authority of the central government and its policies, and in particular to ensure the construction of the intercontinental railway. Later, the declaratory power was effectively used as a tool to regulate the national

grain market in the pursuit of the constitutional vision of integrating the western region of Canada in the country.

But even in the heady early days when the exercise of these powers was commonplace because of the constitutional mandate to create a single country, their use for other purposes was firmly, and ultimately successfully, challenged. Both powers faded almost into desuetude when these large constitutional and national tasks had been accomplished. The power of disallowance, which had for long been in decline, has not been used since 1942. The declaratory power has suffered a similar fate and has been used since 1942. The declaratory power has suffered a similar fate and has been used only twice since the 1960s. It is the very breadth of these powers that protects against their frequent or inappropriate use. It was not the courts but political forces that dictated their near demise. They are, as was said of the power of disallowance, “delicate” and “difficult” powers to exercise and “will always be considered a harsh exercise of power, unless in cases of great and manifest necessity ...”; see *Severn v. The Queen* (1878), 2 S.C.R. 70, *per* Richards C.J., at p. 96, and Fournier J., at p. 131. Their inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise. In a word, protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism.

I see nothing in the statement in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, to the effect that a substantial measure of provincial consent was required before the Constitution could be amended that is in any way at odds with this. For the Court in that case made it clear that it was not within its province to enforce this requirement. It was, it noted, a convention. The enforcement of conventions lies in the political, not the legal field. They can be broken, and the courts have no power to prevent this, but there is a political price to pay. The courts have not engaged in the task of defining the manner in which these broad political bases of Canadian federalism should be protected. The Constitution has not accorded them that mandate. These are matters for the people. This is not to say that the courts do not have an important, indeed essential, role in balancing federalism as they go about their task of defining the nature and effect of those great but more subtle powers, not susceptible of definition and direction by those elemental political forces that undergird Canadian federalism. Finally I should add that Dickson C.J.’s description in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 671, of federal power under s. 92(10) as “narrow and distinct” has nothing to do with the present case at all. He was there comparing this and other particularized powers with broadly described powers, such as trade and commerce, and the extent to which incidental exercises of jurisdiction could be “tacked-on” to these various powers.

I next note the argument that the declared nuclear facilities fall to be regulated by federal authorities but only in relation to their safety and security aspects not labour relations generally. This approach is supported by reliance on the preamble to the *Atomic Energy Control Act*. The preamble may set forth the purpose why Parliament declared works for the development of atomic energy to be for the general advantage. But once the declaration is made the legislative power flowing therefrom is governed by the Constitution. As noted earlier, the work subject to the declaration is in the same position as if it were expressly mentioned in the Constitution. At best, the preamble might give some clue as to what works were intended to be covered by the declaration; it cannot, however, define the scope of legislative power to be exercised by Parliament in respect of a work, once it is determined that it falls within the ambit of a declaration. I should add that I find difficulty in understanding the argument because safety and security are as much in jeopardy from the manner in which employees do their work as in the manner in which a facility is constructed, and, as the Chief Justice points out, many of the regulations of the Atomic Energy Control Board

have to do with labour relations. The fact that these are established by one federal organism rather than another does not affect their character.

In truth, I find that this attempted restriction of federal power to health and security considerations flies in the face of the Act. What the declaration there gives Parliament is jurisdiction, *inter alia*, over works constructed for the production, use and application of atomic energy. In making legislation to that end, I fail to see how one can logically limit it to health and security concerns.

Again, there is the argument that for many years the parties resorted to the Ontario *Labour Relations Act* rather than the *Canada Labour Code*. But this, as I see it, is of no moment. The case is not dissimilar in that respect from *Attorney General for Ontario v. Winner*, [1954] A.C. 541, where the province had exercised jurisdiction over interprovincial motor transportation for an even longer period.

Finally there is the argument based on inconvenience. Bifurcating legislative power over labour relations in Ontario Hydro, a single enterprise, would, it is said, create practical difficulties. Two sets of rules would apply to different employees and, of course, there is the difficulty of drawing the line between federal matters and provincial matters. These problems are not really new. The interrelationship between Parliament's power over federal works and closely related provincial activity has always raised practical difficulties. Even the present type of difficulty is not unique. In *Shur Grain Division*, *supra*, the Federal Court of Canada had occasion to deal with a similar situation. Again, it is obvious from a close reading of the *Stevedores* case, *supra*, that had the shipping company there been engaged solely in intraprovincial shipping (as opposed to interprovincial as was assumed), stevedores could not have been combined in a unit comprising office employees or other workers engaged in matters not related to navigation. Similar views are expressed in other cases; see, for example, *R. v. Picard, Ex parte International Longshoremen's Association* (1967), 65 D.L.R. (2d) 658 (Que. Q.B.); and *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115. Various techniques of administrative inter-delegation have been developed to deal with problems of conjoint interest following upon the case of *Winner*, *supra*. If the problems here are sufficiently acute, and Parliament deems it appropriate to do so, resort could be had to such techniques.

Other Provincial Powers Over Works - Section 92A

The appellants also sought to argue that the works described in s. 92(10)(c) did not extend to works specifically mentioned in other provisions of the Constitution. As Iacobucci J. has observed, this involves interpreting the Constitution as consisting of logic type compartments. The Constitution must, rather, be interpreted as an organic instrument. I accept my colleague's conclusion that s.92(10)(c) extends to works created under other headings in s. 92, and s. 92A cannot be considered any different in this respect. Provisions granting legislative powers placed in separate sections to provide for qualifications to those powers should be treated, subject of course to those qualifications, in the same way; see *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1149, *per* Estey J. (Beetz J. concurring), at p. 1201. As will be seen, I agree with Iacobucci J. as well that s. 92A does not have the effect of removing from the ambit of Parliament's authority works declared to be for the general advantage of Canada. Where I differ from my colleague is with his view of the nature of the power accorded to the provinces by s. 92A(1)(c) to legislate in relation to the development, conservation and management of sites and facilities in the province for the generation of electrical energy.

It must be confessed that s.92A(1), including para. (c), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers; see P.W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 29-19. So it is tempting to seek additional meaning from the

provision. It may be, however, that s. 92A(1) is merely preliminary to the provisions that follow, although, as I will indicate, it, at a minimum, fortifies the pre-existing provincial powers. There is reason to think this was one of its major goals.

To understand the situation, it is useful to examine the backdrop against which s. 92A was passed. In a general sense, the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces. These concerns were by no means minimized by cases such as *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, which underlined the severe limits on provincial power over resources that are mainly exported out of the province, as well as on the provincial power to tax these resources.

It was to respond to this insecurity about provincial jurisdiction over resources - one of the mainstays of provincial power - that s. 92A was enacted. Section 92A(1) reassures by restating this jurisdiction in contemporary terms, and the following provisions go on, for the first time, to authorize the provinces to legislate for the export of resources to other provinces subject to Parliament's paramount legislative power in the area, as well as to permit indirect taxation in respect of resources so long as such taxes do not discriminate against other provinces.

Most commentators mention only these issues in describing the background against which s. 92A was enacted, but there were others, specifically in relation to the generation, production and exporting of electrical energy, that must have been seen as a threat to provincial autonomy in these areas. In most of the provinces, at least, the generation and distribution of electrical energy is done by the same undertaking. There is an integrated and interconnected systems beginning at the generating plant and extending to its ultimate destination. There was authority that indicated that even an emergency interprovincial grid system might effect an interconnection between utilities sufficient to make the whole system a work connecting or extending beyond the province, and so falling within federal jurisdiction within the meaning of s. 92(10)(a) of the *Constitution Act, 1867*; see *British Columbia Power Corp. v. Attorney General of British Columbia* (1963), 44 W.W.R. 65 (B.C.S.C.). More important, provincial power commissions supply electrical energy to other provinces and the United States on "a regular and continuing basis", which a number of cases in other areas have held to be sufficient to make an integrated undertaking fall within federal legislative competence; see, for example, *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 1 O.R. 272 (C.A.). There was danger, then, that at least the supply system and conceivably the whole undertaking, from production to export, could be viewed as being a federal undertaking. For a discussion of these problems as they appeared in the period preceding the enactment of s. 92A, see G.V. La Forest and Associates, *Water Law in Canada* (1973), at pp. 46 *et seq.*, esp. at pp. 50-51, 53-56. While a number of commentators, including myself, did not share this view of the law, the result on the authorities was by no means certain. The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(c)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence. The nature of provincial electrical generating and distribution systems at the time of the passing of s. 92A must have been appreciated.

What is important to note is that the danger to provincial autonomy over the generation of electrical energy did not arise out of the discretion Parliament had or might in future exercise under its declaratory power. The danger, rather, lay in the possible transformation of these enterprises into purely federal undertakings by reason of their connection or extension beyond the province. Sec-

tion 92A ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy that might otherwise be threatened by s. 92(10)(a). But I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada) over "[a]ll works and undertakings constructed for the production, use and application of atomic energy". This, as already seen, comprises the management of these facilities, displacing any management powers the province might otherwise have had under s. 92A. And a vital part of the power of management is the power to regulate labour relations.

Peace, Order and Good Government

This case can equally well be disposed of under Parliament's power to legislate over matters of national concern under the peace, order and good government clause in s.91 of the *Constitution Act, 1867*. There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power; see *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. No one seriously disputed this assertion, and my colleagues both agree that this is so. The view of the Attorney General of Canada is supported by authority in the lower courts; see *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.), at p. 869; and *Denison Mines Ltd. v. Attorney General of Canada*, [1973] 1 O.R. 797 (H.C.), at p. 808. The strategic and security aspects of nuclear power in relation to national defence and the catastrophe and near catastrophe associated with its peaceful use and development at Chernobyl and Two Mile Island bespeak its national character and uniqueness.

The appellants, we saw, argue, however, that the distinct aspects over which atomic energy rises to the national level are those concerned with health and safety. But this very argument is self-defeating. With the inherent potential dangers associated with nuclear fission, industrial safety - indeed the safety of people hundreds of miles from a nuclear facility - is necessarily dependant on the personnel who operate the facility. A strike, and indeed more carelessness, could invite disaster. As the Attorney General of Canada put it: "The whole purpose of federal regulation of nuclear electrical generating plants would be frustrated if Parliament could not govern the standards and conditions of employment of the individuals who operate the plant, both for their own safety, and for that of the general public."

Quite apart from this doomsday scenario, what was said in the context of a work subject to the declaratory power applies equally to a work over which Parliament has jurisdiction under its general power in relation to matters of national concern. Labour relations are an integral part of that jurisdiction. I observe that this approach had been adopted in *Pronto, supra*.

I add that what I have had to say about the relationship of nuclear facilities to various provincial legislative powers, including those arising out of s. 92A of the *Constitution Act, 1867*, fully applies here.

Provincial Instrumentality

Finally, the appellant Ontario Hydro advanced the notion that federal legislation should be so interpreted as not to apply to corporations set up to advance a provincial purpose. It conceded, however, that it was not a Crown agent and so not entitled to Crown immunity in the traditional sense. The Attorney General for New Brunswick did, however, argue that Crown immunity should

apply where Crown agency is established. It is, therefore, right to say that the latter argument cannot stand in view of my holding that provincial laws regarding labour relations are inapplicable to works falling within the exclusive legislative jurisdiction of Parliament, since such legislation falls within the core of that jurisdiction.

Turning to Ontario Hydro's argument about provincial instrumentalities, I note that a similar argument was advanced by Alberta in relation to a "provincial project", the Oldman River Dam; see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63, 68-69. The Court rejected this contention, which it branded as not particularly helpful in sorting out constitutional authority over the work and as positing a type of interjurisdictional immunity that had earlier been rejected in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225, at p. 275. Similar considerations apply here. The fallacy in this context appears to result from the failure to recognize labour relations as vital aspects of the management of nuclear facilities, for no similar argument is made in respect of regulations under the *Atomic Energy Control Act*.

Disposition

I would dismiss the appeals and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the *Canada Labour Code* applies to employees of Ontario Hydro who are employed on or in connection with nuclear facilities that come under s. 18 of the *Atomic Energy Control Act*. I would make no order as to costs.

THE CHIEF JUSTICE:

I. Introduction

I have read with interest the thorough and thoughtful reasons of my colleague, Justice Iacobucci, and although I agree with much of his analysis of the law applicable to these appeals, I cannot, with respect, agree with his disposition of these appeals. Although there are two appeals before the Court, they are in substance one, and I shall refer to the proceedings herein as "the appeal".

I agree with Iacobucci J. that Parliament's legislative jurisdiction over works such as nuclear generating stations, whether it arises pursuant to a declaration under s. 92(10)(c) of the *Constitution Act, 1867*, or pursuant to Parliament's power under s. 91 of that Act to make laws for the peace, order and good government of Canada (the "p.o.g.g." power), is not "plenary". Rather, federal jurisdiction over such works must be carefully described to respect and give effect to the division of legislative authority on which our federal constitutional scheme is based. Under s. 92(10)(c), I fully agree with Iacobucci J. that "Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved". The p.o.g.g. power is similarly subject to balancing federal principles, limiting the federal government's p.o.g.g. jurisdiction to "the national concern aspects of atomic energy ... namely the fact of nuclear production and its safety concerns".

However, I cannot agree with Iacobucci J.'s assessment of how this balance ought to be struck; specifically, I am of the view that the power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy is integral to Parliament's declaratory and p.o.g.g. jurisdictions. I reach this conclusion through an examination of the national and international regulatory framework applicable to the production of nuclear energy, previous decisions of this and other courts respecting constitutional jurisdiction over labour relations, and the effect of s.92A(1)(c) of the *Constitution Act, 1867*.

II. Analysis

A. Regulatory Framework

(a) The Atomic Energy Control Act

The production of nuclear energy in Canada is regulated by legislation (the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16 (the "AECA")), regulations made under that Act, and licences granted by the Atomic Energy Control Board pursuant to that Act and the regulations.

The declaration in s. 18 AECA, that "All works and undertakings constructed (a) for the production, use and application of atomic energy ... are, and each of them is declared to be, works or a work for the general advantage of Canada" is the primary indication of Parliament's interest in the production of atomic energy. The scope of that interest is suggested by the preamble to the *AECA*, which states:

WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;

I cannot, with respect, agree that the preamble does not reveal a federal interest in regulating labour relations. Rather, I think that stating Parliament's interest in the "control and supervision of the ... application and use of atomic energy" directly implicates regulation of the activities involved in that application and use, which in turn involves the regulation of those employed in producing nuclear power. In fact, Iacobucci J. agrees that "the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns" (emphasis added). With respect, I believe that all of the concerns attendant on the production of nuclear energy arise in the regulation of labour relations at nuclear production facilities, as is shown by the way in which the general content of the preamble is particularized in the *AECA* and its regulations.

As the discussion below of the regulations made under the *AECA* makes clear, the Atomic Energy Control Board is given broad regulation-making power, through which the production of nuclear energy is primarily controlled and supervised. Section 9(b) *AECA*, for example, allows the Board to make regulations "for developing, controlling, supervising and licensing the production, application and use of atomic energy". It is through this regulation-making power that the Board has made clear the federal government's interest in labour relations matters affecting nuclear energy, and to which I shall now turn.

(b) The Atomic Energy Control Regulations

The *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365, evince a strong federal interest in the employment of the men and women who operate Ontario Hydro's nuclear production facilities. Although none of the provisions seek to regulate the collective bargaining process, or refer explicitly to terms or conditions which must be included in collective agreements covering such workers, the regulations do show in a more general way that Parliament's interest in health, safety and security at nuclear production facilities is in large part an interest in the employment of those persons who operate such facilities.

An application made to the Atomic Energy Control Board, under s. 7(2) in Part I of the regulations, for a licence to, *inter alia*, use any prescribed substance must, if the Board so requires, set out "(g) a description of the qualifications, training and experience of any person who is to use the

prescribed substance". The licence granted by the Board may include conditions respecting measures to be taken to protect against excessive doses of radiation (s. 7(3)(a)), instruction to be given to workers respecting radiation hazards and procedures (s. 7(3)(c)), measures to be taken against theft, loss or unauthorized use of prescribed substances (s. 7(3)(f)), and the qualifications, training and experience of anyone who is to use or supervise the use of prescribed substances (s. 7(3)(g)).

Similar provisions govern the licensing procedure for operating a nuclear facility described in Part II of the regulations.

Where a licence has been issued, records must be kept of the names of all persons involved in the use and handling of prescribed substances, doses of radiation received by any person, and medical examinations required under the regulations (Part III, s. 11(1)).

Part IV of the regulations concerns security, and prohibits unauthorized disclosure of various types of information about prescribed substances and nuclear facilities (s. 13(1)). Furthermore, the Board may designate "protected places" for secrecy into which unauthorized persons may not enter.

Part V of the regulations concerns health and safety, and s. 17 requires radiation dosage notification and examination procedures for atomic radiation workers, as well as prohibiting some persons from working as atomic radiation workers. Indeed, Part V is almost exclusively concerned with employees at nuclear facilities such as Ontario Hydro's.

Part VI, the general part of the regulations, imposes several employment-related obligations on licensees, including providing appropriate safety equipment and clothing and providing adequate warning to any person (which would include employees) who may be affected by an escape of radioactive material. Employees are under similar obligations to observe safety procedures and use safety equipment and clothing.

I think that it can be foreseen how these stringent and detailed obligations of licensees such as Ontario Hydro might be reflected in collective agreements between the management and employees of nuclear facilities, especially where dosage monitoring, notification, and protection are concerned. The various restrictions on who may be employed at the facility might be incorporated into the collective agreement. The Atomic Energy Control Board's training and experience requirements might influence the negotiation and drafting of promotion and seniority clauses. An employee's failure to use the required safety equipment, or to observe required safety procedures, could be the subject of discipline governed by the collective agreement. The labour relations board might have to distinguish between a legitimate plant shut-down and an illegal lock-out during a labour dispute. The requirement that the collective agreement conform to the regulatory requirements of the statute, regulations and licence might be relevant to proceedings to determine whether the parties were bargaining in good faith. Other examples of the mutual concerns in the regulations and most collective agreements are not difficult to anticipate.

I draw these parallels not to suggest that the regulations will dictate the substantive content of collective agreements for those employed on or in connection with nuclear energy production facilities, but rather to show that the matters of concern to management and labour in drafting and negotiating a collective agreement are reflected in the regulations, and that the interests in both cases are quite similar. As is the case with the *AECA*, Parliament's regulation of nuclear facilities, under the concerns of health, safety and security, includes a strong employment and labour relations component.

(c) Licences

One of the licences described in the *AECA* and the regulations have been put before this Court (Reactor Operating Licence No. 10/86, for the Bruce Nuclear Generating Station “A”).

Article A.A.3 sets out detailed staffing requirements, including written Atomic Energy Control Board approval of certain employees, minimum staffing requirements, and notice of staffing changes. Article A.A.19 requires the prompt reporting of any attempted or actual breaches of security, threats or sabotage (sub-article (iv)), and of “actual or impending instances of industrial disputes or civil demonstrations which could affect the safety or security of the nuclear facility” (sub-article (v)), and “any event which constitutes or reveals a violation of the conditions of this licence, the Physical Security Regulations or the Atomic Energy Control Regulations” (sub-article (ix)). This last sub-article covers all of the personnel requirements of the regulations and licence described above.

It is said that the lack of any imposition of the federal control over labour disputes in the licence indicates that such control is not integral to federal jurisdiction. However, with respect, I believe that what demonstrates that jurisdiction over labour relations is integral to federal jurisdiction over the production of energy power is not an actual exercise of that jurisdiction (indeed, no such jurisdiction has been exercised in this case, as I discuss below), but a commonality of interests and concerns between the existing federal regulatory framework, and the matters to which labour relations legislation is addressed. The licence provisions do indicate a strong and compelling federal interest in labour relations matters at nuclear facilities, not the least of which is the reporting of potential labour disturbances because of their serious health, safety and security implications. It appears to me that the reporting of labour disturbances to the Atomic Energy Control Board, mandated by the licence, in fact dovetails neatly with federal regulation and supervision of the disturbance itself.

Therefore, I think that the domestic regulation of the production of nuclear energy demonstrates a strong federal interest in the employment of those employed on or in connection with facilities for the production of nuclear energy. Where those employees are unionized, that federal interest extends to the labour relations regime which governs the relationship between the employer and the employees, through their bargaining agent.

(d) International Regulation

The production of nuclear energy is also closely monitored and regulated at the international level, primarily by the International Atomic Energy Agency (the “IAEA”) and the treaties and agreements negotiated through the IAEA to which Canada is a party. The IAEA is mainly concerned with the promotion of the peaceful and safe use of atomic energy, and the prevention of the diversion of nuclear materials to non-peaceful uses.

Many of the security provisions affecting employees in the regulations described above (especially those in Part IV), and the licences under which nuclear facilities operate, can be traced to Canada’s international obligations in the field of nuclear energy. Canada is a “non-nuclear weapon” party to the Treaty on the Non-Proliferation of Nuclear Weapons, Can. T.S. 1970 No. 1, which in Article III imposes “safeguards” on such parties to prevent the diversion of nuclear materials to other than peaceful purposes.

Other IAEA activities demonstrate the vital link between the safe production of nuclear energy and the persons employed in that enterprise. For example, in the *IAEA Yearbook 1992*, at p. D25, the development of a concept called “safety culture” is discussed. Recognizing that (at p. D49) “A principal root cause of failures is human error, which is often the initiator of incidents”, safety cul-

ture, the Yearbook explains, directs individuals, managers, and policy makers to implement strategies and organizational structures to prevent and detect such errors.

A paper presented to an international symposium on the operational safety of nuclear power plants organized by the IAEA also warned against treating employees engaged in the production of nuclear energy like other utility employees. B.J. Csik of the IAEA, in "International Guidance on the Qualifications of Nuclear Power Plant Operations Personnel" (*Operational Safety of Nuclear Power Plants* (1984), vol. II, 315) noted with disapproval that (at p. 323)

Some utilities maintain the attitude in their personnel management policy that a nuclear power plant is just another electric generation plant, even though they are fully aware of the differences between nuclear and fossil-fuelled units for all other purposes.

On the international level, then, there is a consistent recognition that supervising employment on or in connection with facilities for the production of nuclear energy is an integral part of assuring the safety of nuclear facilities and materials. The question remains whether the jurisprudence of this and other courts supports the strong practical reasons in favour of placing the responsibility for both matters with the federal government.

B. *Labour Relations Jurisprudence*

The trilogy (*Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868; and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897), with the cases Beetz J. relied upon in the trilogy, emphasize the intimate link between the power to regulate an industrial activity like producing nuclear energy, and the authority to make laws respecting the management of that activity, which authority usually extends to making laws respecting labour relations. For example, Beetz J. described (at p. 825) the following passage (from *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedoring* case), at p. 592, *per* Abbott J.) as "a classic statement on point":

The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion, a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

My colleague distinguishes this and other such general statements by observing that Ontario Hydro as a whole is a "provincial", rather than a "federal" "undertaking", so that these passages in fact demonstrate the necessity of provincial control over labour relations at Ontario Hydro. Federal jurisdiction over Ontario Hydro's nuclear facilities, it is suggested, extends only so far as the "work" and the "integrated activities related to the work." However, with respect, the description of Ontario Hydro as a provincial undertaking to limit federal jurisdiction under s. 92(10)(c) to the work alone proves too much; a scrupulous application of the works/undertakings distinction relied upon by Iacobucci J. would leave Parliament jurisdiction over nothing more than the physical shell of the nuclear generating facilities, a result which none of the parties supporting provincial jurisdiction go so far as to assert.

To avoid finding such an empty and ineffective jurisdiction over the work alone, commentators and courts have accepted that Parliament's jurisdiction over a work subject to a declaration includes some level of control over the activities which occur on or in connection with it; such activities have often been described as the "undertaking" connected with the work, although the

strict terms of s. 92(10)(c) would seem to limit Parliament's jurisdiction to the work only. For example, the author of *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, asserts (at p. 629) that the effect of a declaration "must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character". My colleague holds that this latter authority does not include labour relations. However, if federal jurisdiction applies to the "integrated activities related to the work, "I see no convincing distinction between what is called the "undertaking" of Ontario Hydro's nuclear facilities (which must be distinguished from the "undertaking" of Ontario Hydro's non-nuclear facilities and operations) and the "integrated activities related to" those nuclear facilities. With respect, I think further that the trilogy suggests the same parallel.

Bell Canada, the subject of the lead judgment in the trilogy, is itself the subject of a declaration by S.C. 1987, c. 19, s. 5, which is confined to the strict limits of s. 92(10)(c): "The works of the Company are hereby declared to be works for the general advantage of Canada." At the time the trilogy was decided, a declaration to the same effect was contained in S.C. 1882, c. 95, s. 4. While Bell Canada was also within federal jurisdiction under s. 92(10)(a), the declaration, if it is not completely redundant, must have been seen as necessary to complete Parliament's control over the enterprise. In the trilogy, Beetz J. used Bell Canada as the paradigm of a "federal undertaking", the labour relations of which would be federally regulated, notwithstanding that Parliament's jurisdiction was at least partly founded under s. 92(10)(c). I would therefore not interpret Beetz J.'s references in the trilogy to "federal undertakings" as restrictively as is suggested, but rather would rely on those cases for the simple but compelling proposition that jurisdiction to regulate a work and its related integrated activity, here the production of nuclear energy, *prima facie* includes jurisdiction to make laws respecting its labour relations.

The special problems raised by such divided activities within a single enterprise were canvassed by this Court in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733. Most of Northern Telecom's employees were subject to provincial labour law. However, some employees were "installers", who installed telephone equipment in Bell Canada's telephone network. The Canada Labour Relations Board determined that the installers were not employed on or in connection with the federal enterprise that was Bell Canada, and who were outside of its jurisdiction. This Court held that the installers were sufficiently integrated into the operations of Bell Canada to fall within federal labour relations jurisdiction. Writing for the majority of this Court, Estey J. described the inquiry before the Court, as it had been outlined by Dickson J. (as he then was) in an earlier incarnation of the litigation (*Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115). Dickson J. wrote (at p. 133):

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Estey J. found that the installers were an integral part of the core federal undertaking, so that they fell under federal jurisdiction.

Applying the same test to employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities, I think it is clear that their "normal or habitual activities" are intimately related to the federal interests in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interests in health, safety and security, matters completely within the daily control of those operating nuclear facilities. The IAEA materials make this clear.

Therefore, I would conclude under both the declaratory jurisdiction and the p.o.g.g. jurisdiction, that the labour relations of Ontario Hydro's employees involved in the production of nuclear energy, related as it is to the federal interest in atomic energy, is an integral and essential part of Parliament's jurisdiction, as it was found to be in previous cases like the trilogy in connection with other integrated activities connected to federally declared works.

The courts below, and the parties in this appeal supporting federal jurisdiction over labour relations, relied on the decision of the Ontario High Court of Justice in *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862. My colleague fully reviews the facts and result in this decision, which upheld federal p.o.g.g. jurisdiction over atomic energy and a resulting jurisdiction over labour relations, but seeks to limit its persuasive authority on four bases: (i) it was decided before this Court's decision in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; (ii) its conclusion is not supported by any reasons; (iii) the issue of jurisdiction over labour relations was conceded by the parties; and (iv) it does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the extent possible.

Responding to the first ground of distinction, with respect, I see nothing in *Pronto* which is inconsistent with this Court's decision in *Crown Zellerbach*. While I agree that *Crown Zellerbach* set a high threshold for finding jurisdiction under the national concern branch of p.o.g.g., I think that atomic energy meets that threshold, as does Iacobucci J. when he states that "there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of ... p.o.g.g.". Where I understand my colleague to disagree with the holding in *Pronto*, based on the subsequent jurisprudence of this Court, is the question of whether labour relations are integral to a great enough extent to Parliament's p.o.g.g. jurisdiction to merit recognition. If they are not, then the p.o.g.g. jurisdiction cannot be allowed to so entrench on provincial jurisdiction. I do not understand my colleague to claim that where such jurisdiction is integral, the scale of impact must nevertheless be reconcilable with provincial jurisdiction. given my position that labour relations are integral to Parliament's p.o.g.g. jurisdiction, I do not see that anything in *Pronto* fails to satisfy the high threshold in *Crown Zellerbach*.

On the second and third grounds, the fact that the parties did not dispute the issue, and that McLennan J. did not, therefore, need to detail his reasoning does not mean that the decision is wrong: McLennan J. could not have accepted the parties' concessions on the very question before him (the jurisdiction of the Ontario Labour Relations Board) if he was of the view that Parliament did not have jurisdiction over labour relations as part of its p.o.g.g. jurisdiction. In fact, his concise reasoning with respect to what must necessarily be included in Parliament's jurisdiction over labour relations over atomic energy was based on the *Stevedoring* case, and McLennan J. even expressed his holding in a paraphrase of the words of Rand J. in that decision.

Finally, on the fourth ground, the precise accommodation to be worked out between the federal and provincial governments is the issue in this appeal, and in my view, the division of authority I arrive at, which is the same as that found by McLennan J., respects this accommodation, for the reasons I have outlined above.

Therefore, while this Court is by no means bound by the decision in *Pronto*, the judgment is not entirely without persuasive force, presaging as it does the close link between Parliament's interests in regulating nuclear energy and its interest in regulating the labour relations of those involved in the production of nuclear energy.

An instructive contrast is provided by this Court's decision in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031. Four B was an Ontario corporation operating

a factory on a Mohawk Indian reserve, pursuant to a licence issued by the Minister of Indian Affairs and Northern Development under the *Indian Act*, R.S.C. 1970, c. I-6. The company was privately owned and operated by four members of the Band, in a building leased from the Band Council. Of Four B's 68 employees, 48 were Band members, 10 were former Band members, and 10 were non-Indians. The respondent union was certified as the bargaining agent for the employees under the Ontario *Labour Relations Act*, R.S.O. 1970, c. 232, but Four B objected to the jurisdiction of the Ontario Labour Relations Board to make the certification order. Four B asserted that labour relations at the company were within the exclusive jurisdiction of Parliament, pursuant to s. 91(24) of the *British North America Act, 1867*.

Beetz J., for the majority of the Court, rejected Four B's submission. He began by stating the principles applicable in *Four B*, based on the jurisprudence of this Court (at p. 1045):

With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses.

Applying these principles to Four B, Beetz J. concluded (at p. 1046):

There is nothing about the business or operation of *Four B* which might allow it to be considered as a federal business: the sewing of uppers on sport shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. [Emphasis added.]

This focus on the nature of the activity involved and the operational nature of the business, instead of on the external trappings of the business, is equally apt in the case of Ontario Hydro's nuclear facilities. With respect, Iacobucci J.'s reliance on the fact that Ontario Hydro, as a whole, is a provincial undertaking fails to appreciate the nature of the activity involved in, and the operational nature of, Ontario Hydro's nuclear facilities in particular. Unlike the situation in *Four B*, producing nuclear energy is not an "ordinary industrial activity" which is only incidentally carried on by federally regulated persons. Instead, the activity itself is within the federal legislative domain. Similarly, the "operational nature" of the business of producing nuclear energy directly engages Parliament's interest in controlling and supervising the application and use of atomic energy. As in *Four B*, then, the provincial trappings of Ontario Hydro's nuclear facilities should not mask their essentially federal operational nature.

C. The Effect of Section 92A(1)(c)

Ontario Hydro and the intervenors supporting its position argue as if the federal government were seeking jurisdiction over the labour relations of all Ontario Hydro employees, simply because some Ontario Hydro employees are engaged in the production of nuclear energy. If this were the case, I would agree that Ontario Hydro's status as "a provincial undertaking" was relevant, and that s. 92A(1)(c) operates to foreclose such a result. Provincial jurisdiction over all aspects of the majority of Ontario Hydro's operations, pursuant to s. 92A(1)(c), remains undisturbed by my holding in this case that the labour relations of those employed on or in connection with facilities for the production of nuclear energy are federally regulated.

This is how I would respond to concerns that s. 92A(1)(c) be given some meaning in this case. Only those employees actually employed on or in connection with facilities for the production of

nuclear energy are federally regulated. In his affidavit, Arvo Niitenberg, Ontario Hydro's Senior Vice President of Operations, explains that generating electricity requires a source of energy, a turbine, and a generator. The source of energy at nuclear facilities is a nuclear fission reaction, which generates heat energy, which is then used to turn water into steam. That steam drives the turbine, which spins the generator, which produces the electricity by means of an electromagnet and wire coils. The affidavit makes it clear that, once the steam is produced, there is no difference between thermal (i.e., fossil-fuel) and nuclear electrical generation. Although I would leave it to the Ontario Labour Relations Board to exclude those particular employees from its jurisdiction who are covered by the *Canada Labour Code*, in general terms I am of the view that it is only those employees involved in the first of the three parts of the generation phase who would be federally regulated. That is, those employees engaged in using nuclear reactors to generate heat energy would be covered by the federal legislation, while those who are involved with using that heat energy to run the turbine, which in turn runs the generator, would be provincially regulated. The former employees are employed in the production of nuclear (heat) energy, and come under federal jurisdiction under both the declaratory and p.o.g.g. powers; the latter employees are employed in the production of electricity, and the management of their activities fall to the provinces under s. 92A(1)(c).

It appears to me that Ontario Hydro's facilities where nuclear power is used actually involve two plants: one for the production of nuclear (heat) energy, and another for the generation of electricity using that heat energy. Once the heat energy is produced, it matters little how it was produced for the rest of the generation phase. As the parties have not, unfortunately, presented detailed evidence of job classifications and descriptions at Ontario Hydro's nuclear facilities, I would leave the precise details to the appropriate Labour Relations Boards. The Ontario Labour Relations Board in this case did not indicate that it foresaw any difficulty in making such a determination, should its decision as to its jurisdiction be upheld on judicial review.

D. Other Factors

(a) Laches

It was suggested by parties and interveners supporting provincial jurisdiction in this appeal that the failure of the federal government to actually regulate the labour relations of Ontario Hydro employees involved in the production of nuclear energy should weaken its present claim that federal jurisdiction over labour relations is integral to the federal regulation of atomic energy.

There is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis. In this respect, I would adopt the statement of Reed J. in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1985] 2 F.C. 472 (T.D.), at p. 488:

The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights. (Refer: *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032 for a case in which unconstitutional action had remained unchallenged for ninety years.)

I do not understand any of the parties or interveners to suggest that any form of the doctrine of laches applies. At best, the failure of the federal government to exercise its jurisdiction weakens the factual argument that such federal jurisdiction is necessary, but does not dispose of it.

However, just because labour relations have been successfully regulated under provincial law up to

this challenge does not mean that authority to regulate them should be left there for the sake of expediency. Similarly, the hypothesis that a provincial labour relations regime could respond to safety concerns as well as a federal regime, does not dispose of the question of which level of government should respond to such concerns.

(b) Problems of Divided Jurisdiction

It is important to remember the words of Estey J. in the 1983 *Northern Telecom* decision, *supra*, at p. 760, that this Court is not concerned “with the question of relative efficiency as between the assignment of the labour relations here in question to the federal or the provincial jurisdiction”. To similar effect are the comments of McIntyre J., for the Court, in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 334: “... it is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised”. McIntyre J. also quoted Laskin C.J. in *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R., 42, who wrote at p. 76:

They [governments] are entitled to expect that the Courts, and especially this Court, will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for the serious consequences of holding them *ultra vires*. Yet, if the appraisal results in a clash with the Constitution, it is the latter which must govern.

In this case, Galligan J.A., and the parties and interveners supporting provincial jurisdiction, argued that “it would make no labour relations sense” to divide Ontario Hydro’s labour relations between those employees engaged in the production of nuclear energy, and those employed in the other aspects of the generation phase, as well as the transmission and distribution phases. While this is no doubt a concern, given my finding that Parliament has jurisdiction over the labour relations of these employees, it cannot be allowed to be a determinative one.

I am confident that the Ontario Labour Relations Board is capable of determining which employees fall under its jurisdiction, as was the Board itself. Labour lawyers have worked out much more complicated matters than divided jurisdiction within Ontario Hydro’s nuclear generating facilities.

III. Disposition

I would dismiss the appeals, and confirm the order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the *Canada Labour Code* does apply to employees of Ontario Hydro who are employed on or in connection with those nuclear facilities that come under s. 18 *AECA*. I would make no order as to costs.

IACOBUCCI J.: The question in these appeals is whether the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally applies to govern labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro’s nuclear electrical generating stations. Although technically there are two appeals involved, in substance there is only one and so I refer herein to both as “the appeal”.

I. Facts

Ontario Hydro is a corporation owned by the province of Ontario and no one disputes that it is not a Crown agent. Its affairs are governed by the *Power Corporation Act*, R.S.O. 1990, c. P.18. Ontario Hydro has 81 electrical generating stations of which 5 are nuclear electrical generating stations. These five nuclear plants provide roughly 48 percent of Ontario Hydro’s total electrical power generating capacity. Power is generated in the nuclear stations by way of CANDU reactors which, through the process of nuclear fission, produce enough energy to drive the facilities’ tur-

bines. Once generated, this power (along with that originating from thermal and hydraulic generating stations) is distributed throughout the province by way of a network of transformer and distribution stations. Plutonium, deuterium and deuterium oxide, cobalt-60 and tritium oxide are produced during the electricity generating process; these substances are all prescribed under the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16.

The operation of a nuclear reactor is heavily regulated by federal legislation. Section 18 of the *Atomic Energy Control Act* declares that all works and undertakings constructed for the production of atomic energy and the production of prescribed substances are works for the general advantage of Canada. Each of Ontario Hydro's CANDU reactors is covered by a licence issued by the Atomic Energy Control Board ("AECB") under the regulations made under the *Atomic Energy Control Act*. These licences impose requirements with respect to the way Ontario Hydro operates the facilities, Ontario Hydro's radiation protection measures and emergency procedures, and the measures taken regarding the physical security of fissionable prescribed substances and of the facilities themselves. The licences also dictate minimum staffing levels in the control rooms, require written AECB approval of certain staff positions in the facilities (including those in positions affected by the application for certification which initiated the present action), and prescribe that significant staffing and organizational changes in the facilities require prior notice to and the written permission of the AECB. Notwithstanding the declaration in s. 18 of the *Atomic Energy Control Act*, some employees at Ontario Hydro's Bruce nuclear plant have been unionized under provincial labour legislation since 1973.

This case arose when the Society of Ontario Hydro Professional and Administrative Employees ("Society") applied under the Ontario *Labour Relations Act* to the Ontario Labour Relations Board ("OLRB") for certification as the exclusive bargaining agent for a unit of administrative, scientific and professional engineering employees of Ontario Hydro, including those employed at Ontario Hydro's nuclear plants. The application was challenged by a group of employees calling themselves the Coalition to Stop the Certification of the Society. One of the grounds for the challenge was that the OLRB was without jurisdiction to certify the proposed bargaining unit because some of the employees within the proposed unit, viz those who worked at Ontario Hydro's nuclear generating stations and at the construction site for the nuclear generating station at Darlington, fall under the jurisdiction of the *Canada Labour Code*. The Coalition claimed that the declaration in s. 18 of the *Atomic Energy Control Act*, combined with ss. 91(29) and 91(10)(c) of the *Constitution Act, 1867*, brought Ontario Hydro's nuclear generating stations within exclusive federal jurisdiction with respect to labour relations because s. 4 of the *Canada Labour Code* declares the Code applicable to all persons employed on or in connection with a federal work.

The OLRB held hearings to determine whether or not it had jurisdiction to include in the proposed bargaining unit a category of employees definable by reference to s. 18 of the *Atomic Energy Control Act*. The Attorneys General of Canada and Ontario declined to participate in these hearings but the Canadian Union of Public Employees ("CUPE"), which was then certified as the bargaining agent for all unionized employees of Ontario Hydro including employees at the Bruce nuclear plant, participated with the consent of the parties. The OLRB held that it had no jurisdiction to certify the Bargaining unit in the Society's application because the proposed unit included employees, employed on or in connection with the nuclear generating stations, who fell under the jurisdiction of the *Canada Labour Code*: [1988] OLRB Rep. Feb. 187.

Ontario Hydro, supported by the Society and CUPE, applied to the Ontario Divisional Court for judicial review by way of an order in the nature of *certiorari* quashing this decision of the OLRB; the Attorney General of Canada intervened at this stage of the proceedings in support of the OLRB. The Divisional Court granted the application for *certiorari*, quashed the OLRB's decision,

and issued mandamus ordering the OLRB to deal with the Society's certification application: (1989), 69 O.R. (2d) 268, 33 O.A.C. 302, 60 D.L.R. (4th) 542, 89 CLLC 14,014.

The Attorney General of Canada appealed that decision to the Ontario Court of Appeal. The Court of Appeal, Galligan J.A. dissenting, allowed the appeal, set aside the decision of the Divisional Court and ordered that the decision of the OLRB be reinstated; (1991), 1 O.R. (3d) 737, 43 O.A.C. 184, 77 D.L.R. (4th) 277, 91 CLLC 14,014 (hereinafter cited to O.R.). This Court granted leave to appeal, [1991] 3 S.C.R. x, and the Chief Justice stated the following constitutional question:

Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c.L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in the Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16?

II. Relevant Legislation and Constitutional Provisions

Atomic Energy Control Act, R.S.C., 1985, c. A-16

Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;

• • •

18. All works and understandings constructed

- (a) for the production, use and application of atomic energy,
- (b) for research or investigation with respect to atomic energy, and
- (c) for the production, refining or treatment of prescribed substances,

are, and each of them is declared to be, works or a work for the general advantage of Canada.

Canada Labour Code, R.S.C., 1985, c. L-2

2. In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

• • •

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces;

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers,

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

• • •

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

• • •

10. Local Works and Undertakings other than such as are of the following Classes:--

• • •

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

• • •

13. Property and Civil Rights in the Province.

• • •

16. Generally all Matters of a merely local or private Nature in the Province.

92A.(1) In each province, the legislature may exclusively make laws in relation to

• • •

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

• • •

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

III. Judgments Below

Ontario Labour Relations Board

The OLRB held that by virtue of ss. 92(10)(c) and 91(29) of the *Constitution Act, 1867*, Parliament

has exclusive legislative authority over local works it declares to be to the general advantage of Canada. Such a declaration, applicable to Ontario Hydro's nuclear generating stations, had been made in s.18 of the *Atomic Energy Control Act*. Counsel for Ontario Hydro argued that Ontario Hydro was an undertaking and not a work constructed for any of the purposes set out in s.18. The OLRB held that a work used by and forming part of an undertaking can be the object of a declaration under s. 92(10)(c). When Parliament makes such a declaration, its jurisdiction over the work extends to the regulation of the use and management of the work forming part of the undertaking (relying on *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434).

The OLRB rejected Ontario Hydro's argument that Parliament only has jurisdiction to make laws with respect to matters of national interest in a work declared to be to the general advantage of Canada: Ontario Hydro's position on this matter was inconsistent with the preamble to s. 91 of the *Constitution Act, 1867* which expressly give Parliament legislative jurisdiction to all matters in the enumerated classes of subjects, including s. 91(29). Ontario Hydro argued that s.92A excludes federal jurisdiction over labour relations because such jurisdiction would conflict with the power of the provinces to "manage" electrical generating facilities: the OLRB held that s. 92A has no special place in the *Constitution Act, 1867* and accordingly must be read in light of s. 91 which gives Parliament exclusive jurisdiction over matters coming within the classes of subjects enumerated in s.91 "notwithstanding anything in this Act".

The OLRB held that the declaration made in s. 18 of the *Atomic Energy Control Act* was valid and proper with respect to Ontario Hydro's nuclear generating facilities. There was no basis for Ontario Hydro's argument that s. 92(10)(c) declarations cannot extend to matters within s 92A(1), or that a declaration may only be made with respect to matters falling solely within s. 92(10)(c): given the wide scope of matters within s. 92, such as property and civil rights, this argument would totally neutralize the s. 92(10)(c) declaratory power. Further, nothing in s. 92A(1) repealed or neutralized the declaration in s. 18 of the *Atomic Energy Control Act*. Accordingly, the federal government had authority to legislate with respect to Ontario Hydro's labour relations with persons employed on or in connection with the nuclear generating facilities. The OLRB declared that it did not have jurisdiction to deal with the Society's application for certification since the proposed unit included employees who fell within federal labour law jurisdiction.

Divisional Court (per Steele, Montgomery and White JJ.)

The Divisional Court held that the special provision for electrical generating facilities is s. 92A removed those facilities from the category of works contemplated by s. 92(10)(c). "Such Works" in s. 92(10)(c) can only refer to local works and undertakings contemplated to be within s. 92(10). This expression cannot refer to a power specifically granted to a province in s. 92A. Section 92A(1)(c) was enacted after the *Atomic Energy Control Act* and Parliament must be deemed to have known that it was placing the generation and production of electrical energy within the jurisdiction of the provinces. Therefore, s. 18 of the *Atomic Energy Control Act* is inapplicable in so far as it purports to declare Ontario Hydro's works to be totally for the general advantage of Canada.

The Divisional Court held that Parliament had the jurisdiction to enact the *Atomic Energy Control Act* in the national interest under the peace, order and good government power ("p.o.g.g. power") in the opening words of s. 91 of the *Constitution Act, 1867*. Parliament's p.o.g.g. power is residuary in nature and should be read together with the specific power in s. 92A(1)(c) not to exclude provincial jurisdiction except where absolutely necessary. Even where there is a conflict between s. 91 and s. 92, the doctrine of mutual modification holds that the general power should be narrowed to exclude the narrower class of subjects.

The Divisional Court also held that, under the double aspect doctrine, the federal p.o.g.g. power

does not necessarily exclude provincial power over labour relations. The pith and substance of the *Atomic Energy Control Act* and the regulations passed under it, is not the management or labour relations of a facility. Section 92A(1)(c) gives the provinces the exclusive power to manage facilities for electrical energy; the provinces therefore have the power to legislate with respect to labour relations at those facilities. The *Atomic Energy Control Act* imposes aspects of parliament's concerns that must be obeyed with respect to the works but this does not totally exclude provincial jurisdiction where the core undertaking is clearly provincial. The Divisional Court distinguished the decision of this Court in *Bell Canada v. Quebec (Commission de la Santé et de la sécurité du travail)*, [1988] 1.S.C.R. 749 ("Bell Canada"), since that case concerned a federal undertaking. Accordingly, under the double aspect doctrine, provincial labour legislation is applicable to the employees who work at the sites in question.

The Divisional Court held that Ontario Hydro is not a federal work or undertaking; therefore the *Canada Labour Code* does not apply according to the scope of the statute set out in s. 4. Further, Ontario Hydro is a "provincial public policy instrument" to which the statute should not be interpreted to apply. Only if Parliament validly amended the *Atomic Energy Control Act* to provide that it was in the national interest that all labour relations at nuclear generating sites be governed by federal legislation would provincial labour legislation be supplanted. The Divisional Court noted finally that the licence for the Bruce nuclear facility, which is representative of the licences issued to all of Ontario Hydro's nuclear generating sites, indicates that all general laws of the province are applicable to the facility, subject to the conditions of the licence. The Ontario labour legislation is a law of general application in the province and can stand together with the federal requirements for health, safety and security.

The Divisional Court ordered that the decision of the OLRB be quashed and directed the OLRB to deal with the Society's certification application.

Ontario Court of Appeal

Tarnopolsky J.A. (Lacourcière J.A. concurring)

Tarnopolsky J.A. indicated that there were two issues before the court. First, did the enactment of s. 92A remove electrical facilities from the category of works contemplated by s. 92(10) of the *Constitution Act, 1867*, rendering the declaration in s. 18 of the *Atomic Energy Control Act* inapplicable to Ontario Hydro's nuclear generating facilities? Second, even if s. 18 does apply to Ontario Hydro's nuclear generating facilities, does Parliament's power extend to the labour relations of the employees of those facilities?

With respect to the first issue, Tarnopolsky J.A. held that the provincial legislative powers in s. 92A cannot be exercised to the exclusion of other federal powers. This view was supported by academic commentators and the pertinent proceedings of the Special Joint Committee on the Constitution. The Divisional court erred in not distinguishing between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the character or nature of those facilities (i.e., being local works). The wording of s. 92A fails to support the conclusion that electrical facilities were removed from the category of works contemplated by s. 92(10)(c).

Further, Tarnopolsky J.A. held that to accept that the federal declaratory power is an exception only to the provincial legislative authority over local works and undertakings in s. 92(10) would result in an absurdity. The jurisdictional basis of a matter over which a province has legislative competence may arise from any number of heads of power; there is not authority for the claim that

legislative competence over a particular subject matter must be founded on or restricted to one head of provincial power. Tarnopolsky J.A. continued (at p. 760):

... I would endorse the finding of the OLRB that, if the declaratory power refers to local works or undertakings *only*, then s. 92(16) - "Generally all Matters of a merely local or private Nature in the Province" - would neutralize Parliament's power to declare anything to be for the general advantage of Canada, for undoubtedly a local work could reasonably be found to be a matter of local or private nature in the province. It is that absurdity which must be avoided.

Section 92A must be read in light of s. 91 using the doctrine of mutual modification, i.e., the provincial power in s. 92A should not be read to exclude the federal power in s. 92(10)(c) and s. 91(29) where the two powers can co-exist. Moreover, Parliament may touch on those classes of subjects assigned exclusively to the provinces under a valid exercise of its legislative powers.

Works or undertakings declared to be to the general advantage of Canada are withdrawn from provincial legislative competence through the operation of s. 92(10)(c) and s. 91(29). Since there is nothing to indicate that works within s. 92A were removed from the class of works in s. 92(10), there is nothing to preclude the declaration in s. 18 of the *Atomic Energy Control Act* from applying to Ontario Hydro's nuclear facilities. The declaration has the effect of granting Parliament control over these works. That control includes the power to regulate the operation of the work, including the employment of persons employed on such works (in this regard, Tarnopolsky J.A. relied on the decision of the Court in *Bell Canada, supra*).

Even if s. 92A removed electrical generating works from s. 92(10), Parliament could validly exercise jurisdiction over Ontario Hydro's nuclear generating facilities using its p.o.g.g. power from the opening words of s. 91. Section 92A does not detract from the scope of Parliament's authority under the p.o.g.g. power. Tarnopolsky J.A. held that "the regulation of atomic energy, as a matter of national concern, must include the labour relations of Ontario Hydro's nuclear facilities, in spite of the practical difficulties that may be encountered as a result of this decision" (p. 764).

Tarnopolsky J.A. concluded (at p. 768):

In conclusion, Ontario Hydro's nuclear facilities are works that, although wholly situate within a province, are declared by Parliament to be for the general advantage of Canada within the meaning of s. 2(h) of the *Labour Code*. As indicated above, by s. 4 Parliament has expressly made the *Labour Code* applicable to all employees who are employed upon or in connection with such works as defined in s. 2. Ontario Hydro's nuclear workers, accordingly, must be governed by the federal *Labour Code*.

Galligan J.A. dissenting

Galligan J.A. felt that, according to the testimony of Arvo Niitenberg, Ontario Hydro's Senior Vice-President of Operations, the division of labour relations between two separate jurisdictions would cause Ontario Hydro serious practical difficulties. This result was to be avoided unless the Constitution required it. Galligan J.A. Held that it was not necessary to decide whether federal jurisdiction over the nuclear generating sites arose from the federal declaratory power or from the federal p.o.g.g. power. He set out the issue in the case as follows (at p. 771):

Because Parliament has exclusive authority to regulate atomic energy it is not contested that it has power to regulate Hydro's five nuclear generating sites. The issue is whether, because of that authority it also has power, to the exclusion of the province, to regulate Hydro's labour relations with its employees working on or in connection with those generating stations.

Galligan J.A. distinguished this Court's trilogy on the interrelation of provincial statutes of general application with federal statutes regulating enterprises which come within Parliament's exclusive

legislative sphere (*Bell Canada*, *supra*; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868); and *Altrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897) on the ground that the undertakings in those cases were truly federal while Ontario Hydro is a provincial undertaking: "Only part of one of its many activities is within the federal sphere of legislative competence" (p. 772). He continued (at p. 773):

I think the principle to be drawn from the treatment of this subject in the trilogy is that a class of subject-matter within the exclusive legislative competence of Parliament will be held to include labour relations if labour relations is an integral part, an essential part or a vital part, of the exercise of that jurisdiction. To apply that principle to this case I think that, if labour relations is an integral, essential or vital part of the power to regulate atomic energy at Hydro's nuclear generating sites, then the exception to the general rule of provincial power over labour relations would apply.

Galligan J.A. concluded that no evidence had been led to demonstrate that labour relations was such an integral part of the regulation of atomic energy. Indeed, since the federal government had not controlled labour relations at Ontario Hydro's nuclear generating sites to date, there was evidence that labour relations were not such an integral part of the regulation of atomic energy. For the same reason that labour relations of a federal undertaking must be regulated federally, the labour relations of a provincial undertaking should be regulated provincially. Therefore there was no reason to apply the exception to the general rule that labour relations fall within the exclusive jurisdiction of the provincial legislatures: "... if the provincial law does not bear on the specifically federal nature of the federal exercise of power the rule excluding application of the provincial law does not apply" (pp. 774-75).

The doctrine of federal paramountcy does not apply where there is no conflict between the two statutes (*Commission de transport de la communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838). Galligan J.A. was disinclined to interpret the statutes so as to create a conflict where they had been applied together without conflict for 25 years. While the licences issued by the AECB to Ontario Hydro's nuclear generating facilities contained provisions relating to the staffing of those stations, there was no demonstrated conflict between these provisions and Ontario Hydro's labour relations with its employees. Galligan J.A. would have dismissed the appeal and affirmed the order of the Divisional Court.

IV. The Constitutional Question

Does the *Labour Relations Act* of Ontario, R.S.O. 1980, c. 228 [now R.S.O. 1990, c. L.2], or the *Canada Labour Code*, R.S.C., 1985, c. L-2, constitutionally apply to the matter of labour relations between Ontario Hydro and those of its employees who are employed in Ontario Hydro's nuclear electrical generating stations which have been declared to be for the general advantage of Canada under s. 18 of the *Atomic Energy Control Act*, R.S.C., 1985, c. A-16?

V. Issues

The constitutional question raises the following issues:

1. What are the nature and effect of the federal declaratory power?
2. May Parliament validly make declarations under s. 92(10)(c) of the *Constitution Act, 1867* with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction in the areas of development, conservation and management by virtue of s. 92A(1)(c) of the *Constitution Act, 1867*?

3. Does a valid declaration by Parliament under s. 92(10)(c) of the *Constitution Act, 1867* over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?
4. If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s. 91 of the *Constitution Act, 1867*, does that jurisdiction include the labour relations of employees employed in those stations?
5. Is Ontario Hydro immune from the operation of the *Canada Labour Code* by virtue of interjurisdictional Crown immunity?

VI. Analysis

1. *What are the nature and effect of the federal declaratory power?*

(a) History of the Declaratory Power

The first appearance of a declaratory power that was to be given to the federal government was in the final Resolutions of the Quebec Conference of 1864. The power was listed with the other specific heads of power of the federal government and was worded as follows:

29. The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

...

11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.

In the final version of the *Constitution Act, 1867*, the declaratory power appeared as an exception to the provincial power over local works and undertakings:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

10. Local Works and Undertakings other than such as are of the following Classes:-

...

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

In its early years, the declaratory power was used almost exclusively in relation to local railways. The federal government began to make declarations regarding electricity companies as well as telegraph and other communications companies in the 1880s. The frequency of declarations, which was at its peak in the late nineteenth century, began to drop off in the early twentieth century. The declaration over atomic energy at issue in this case was passed in 1946. Since the 1960s, the federal government has used the declaratory power only twice although old declarations are still reenacted along with the originating legislation (see P.W. Hogg, *Constitutional Law of Canada* (3rd ed.

1992), vol. 1, at pp. 22-15 to 22-16, and A. Lajoie, *Le pouvoir déclaratoire du Parlement* (1969), at pp. 123-51).

(b) Nature of the Declaratory Power

The federal declaratory power, which is found in the combined operations of s. 92(10)(c) and s. 91(29) of the *Constitution Act, 1867*, is unique in the constitutional division of powers. As Duff J. wrote for this Court in *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, at p. 220:

The authority created by s. 92(10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction - exclusive jurisdiction - in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work of undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

Professor Hogg, *supra*, has also noted the exceptional nature of the federal declaratory power (at p. 22-17):

[T]he federal Parliament's power under s. 92(10)(c) is in conflict with classical principles of federalism because it enable the federal Parliament, by its own unilateral act, to increase its own powers and diminish those of the provinces.

Former Chief Justice Bora Laskin referred to the federal declaratory power as "extraordinary" (see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 627). The uniqueness of the federal declaratory power lies in Parliament's ability to decide to assume jurisdiction over a work which would normally be within exclusive provincial jurisdiction.

How is this extraordinary power to be exercised by the federal parliament? First, Parliament must make an explicit declaration that the work is for the general advantage of Canada, or of two or more provinces. Whether or not a work is for the general advantage of Canada is a policy decision of Parliament which will not normally be reviewed by the courts.

In *The Queen v. Thumler* (1959), 20 D.L.R. (2d) 335, the Alberta Court of Appeal indicated that the doctrine of colourability provides a limitation to the exercise of the declaratory power. However, as one commentator has argued:

[B]ecause of the very nature of the declaratory power, it is doubtful whether the doctrine of colourability would apply to it. The very purpose of s. 92(10)(c) is to extend federal jurisdiction into what otherwise would be the provincial field. Therefore the mere fact that by the declaration the federal Parliament intends to vest in itself jurisdiction over works which otherwise would be within provincial jurisdiction cannot itself be cause for complaint. (K. Hanssen, "The Federal Declaratory Power Under the British North America Act" (1968-69), 3 *Man. L.J.* 87, at p. 103.)

Hanssen suggested that only limit on Parliament's exercise of the declaratory power would be a narrow version of colourability, namely proof that Parliament had acted in bad faith in making a declaration. However, the Court does not need to decide for the purposes of the present appeal whether or not some form of the doctrine of colourability provides a limit on the federal declaratory power.

What may Parliament make the subject of a declaration under s. 92(10)(c) of the *Constitution Act, 1867*? Section 92(10)(c) refers to “Works” which stands in contrast to the reference in s. 92(10)(a) to “Works and Undertakings”. This distinction would appear on its face to limit the federal declaratory power to works or tangible things and to exclude undertakings from the operation of the power. However, Parliament has on occasion declared undertakings to be works for the general advantage of Canada. This Court upheld one such declaration in *Quebec Railway Light & Power Co. v. Town of Beauport*, [1945] S.C.R. 16, which concerned a federal declaration that the undertaking of a company was a work to the general advantage of Canada. Both Rand J. and Hudson J. (who dissented in the result) recognized the validity of the declaration without any explicit discussion thereof. Rinfret J. was of the opinion that the declaration was meant to bring “the whole of the works of the company” within the declaration (at p. 24). Davis J., who dissented in the result of the case, agreed with Rinfret J. and wrote as follows (at p. 29):

It seems to me that the word “undertaking” there used involves the totality of the works of the company and that the effect of the statute was that they were declared to be for the general advantage of Canada. Such a declaration was within the competence of Dominion Parliament when the meaning and scope of the statute is fairly construed.

Kerwin J. held at p. 32 that “no more extended meaning than the word ‘works’ [in s. 92(10)(c)] bears on its proper construction may be ascribed to the word ‘undertaking’ in section 1 of the 1895 Act”.

The line of reasoning that “undertaking” in a federal declaration refers only to the totality of a company’s works is thrown into doubt by other federal declarations, such as that found in s.35 of the *Cape Breton Development Corporation Act*, R.S.C., 1985, c. C-25, which declared the “works and undertakings operated or carried on” by various coal mining and railway companies on Cape Breton Island to be works for the general advantage of Canada. Decisions of this Court such as *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, have assumed that the federal government can declare undertakings as undertakings to be works for the general advantage of Canada.

Thus, Parliament may validly declare an undertaking to be a work for the general advantage of Canada. The outer limit of Parliament’s power to declare undertakings to be works for the general advantage of Canada is that the undertaking must be linked to a work. As Rand J. stated in his partially dissenting opinion in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, at p. 553, “Undertakings, existing without works, do not appear in 92(10)(c) and cannot be the subject of such a declaration”.

In my view, “undertaking” refers to the whole of the enterprise within which a work or works is or are situated. In this case, the undertaking is Ontario Hydro. The undertaking is to be distinguished from the set of integrated activities related directly to the work (here, the production of electricity using nuclear power) and from the work itself (the electrical nuclear generating facilities). In some respects, all undertakings for the purposes of s. 92(10)(c) involve works but not all works may involve undertakings.

As I discussed above, the declaratory power has been used most often with respect to local railways. Other typical subjects of federal declarations include canals, bridges, harbours, telephones, grain elevators and factories of various kinds. Parliament has also made declarations with respect to national battlefields. As Professor Hogg, *supra*, has noted (at p. 22-18):

It appears, however, that the federal government and Parliament are sensitive to the anomalous character of the power and are now inclined to use the power only sparingly. It has been used very rarely in recent times.

(c) The Effect of a Declaration

Having briefly considered the background to and nature of the federal declaratory power and how that power is exercised, one must deal with the most obvious questions as to the effect of a declaration that a work is to the general advantage of Canada. To begin with, the Court has rejected the proposition that Parliament gains jurisdiction over no more than the physical shell of a work when it makes a declaration that a work is for the general advantage of Canada. In several cases involving grain elevators, the Court has held that jurisdiction over declared works includes jurisdiction to regulate the operations of declared works. One example of this is *Chamney v. The Queen*, [1975] 2 S.C.R. 151, where Martland J. stated for the Court (at p. 159):

Having concluded that the premises in question here are works declared to be for the general advantage of Canada, it is clear that Parliament could control the quantities of grain which could be received into an elevator and could enact s. 16(2) of the *Canadian Wheat Board Act* as a means of exercising control over the work and that the appellant could properly be convicted on an offence under that subsection.

Laskin, *supra*, has described federal jurisdiction over declared works as follows (at pp. 628-29):

[T]he result of a declaration of a "work" to be for the general advantage of Canada must surely be to bring within federal authority not only the physical shell or facility but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character.

Contrary to the holding of Desjardins J.A. in her concurring reasons in *Shur Gain Division, Canada Packers Inc. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1992] 2 F.C. 3, at p. 34, Parliament's legislative jurisdiction over a declared work is not "plenary". As Beetz J. said for the Court in *Bell Canada, supra*, at p. 762:

[W]orks, such as federal railways, things, such as land reserved for Indians and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction....

The Court reaffirmed this principle in *Commission de transport de la communauté urbaine de Québec v. Canada (National Battlefields Commission)*, *supra*, where Gonthier J. wrote for the Court (at p. 853):

The immunity pertaining to federal status applies to things or persons falling within federal jurisdiction, some specifically federal aspects of which would be affected by provincial legislation. This is so because these specifically federal aspects are an integral part of federal jurisdiction over such things or persons and this jurisdiction is meant to be exclusive.

It is the fundamental federal responsibility for a thing or person that determines its specifically federal aspects, those which form an integral part of the exclusive federal jurisdiction over that thing or person.

As a result, when the federal government makes a declaration under s. 92(10)(c) of the *Constitution Act, 1867*, that a work is to the general advantage of Canada, Parliament obtains jurisdiction not only over the physical parts of the work but also over those aspects of the operation of the work which makes the work specifically of federal jurisdiction, i.e., those aspects of the work which make the work one for the general advantage of Canada.

This limit on Parliament's jurisdiction over a declared work is consistent with the interpretation of

the declaratory power as a “narrow and distinct” power in order that the power not seriously encroach on provincial jurisdiction (per Dickson C.J. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 671).

This limit is also consistent with the traditional approach to division of powers questions which has been one of balancing federal and provincial powers through the application of doctrines such as mutual modification, double aspect and pith and substance. The *Constitution Act, 1867* set up a federalist system of government for Canada and should be interpreted so as not to allow the powers of either Parliament or the provincial legislatures to subsume the powers of the other. As Henri Brun and Guy Tremblay have written:

[TRANSLATION] The history of the birth of the federation, the first “whereas” in the preamble to the *Constitution Act, 1867* and, in particular, the usually exclusive division of powers contained therein show clearly that the purpose of this Act was to establish a federal system.

That is why, in numerous decisions, the courts have tried to protect the federal foundations of the Canadian system. They have sought the maintenance of a certain balance between the federal government and the provinces.

(*Droit constitutionnel* (2nd ed. 1990), at p. 402.)

This Court recognized the primacy of the balance between federal and provincial powers in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, where the Court held that a substantial measure of provincial consent was required by convention before the Canadian Constitution could be amended. The majority held that the reason for the convention was the federal principle (at pp. 905-6):

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.

While the use of the declaratory power is not as dramatic as the unilateral amending of the Constitution, in my view the federal principle should be respected nonetheless. Parliament’s jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.

Confining Parliament’s jurisdiction over declared works within the sphere of those aspects of the work which make the work of federal jurisdiction accords with the jurisprudence on Parliament’s other unusual power, the power to legislate for the peace, order and good government of the country found in the preamble to s. 91 of the *Constitution Act, 1867*. The cases concerning the p.o.g.g. power have developed a set of strict criteria which the federal government must meet before it can exercise its residual authority. This prevents the p.o.g.g. power from being abused to disturb the balance of federalism. See, for example, the decision of this Court in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, which I will discuss below.

To summarize, the federal declaratory power is unique in that under it, Parliament may decide as a matter of policy to withdraw a work or an undertaking linked to works from what would normally be provincial jurisdiction by declaring the work or undertaking to be a work for the general advantage of Canada, or of two or more provinces. Parliament’s jurisdiction over a declared work is not plenary, but extends only to those aspects of the work which make the work specifically of federal jurisdiction. Put another way, Parliament obtains exclusive jurisdiction to regulate those aspects of the work that are integral to the federal interest in the work.

2. *May Parliament validly make declarations under s. 92(10)(c) of the Constitution Act, 1867 with respect to nuclear electrical generating stations over which the provinces enjoy jurisdiction*

in the areas of development, conservation and management by virtue of s. 92A(1)(c) of the Constitution Act, 1867?

The parties do not dispute that the combined effect of s. 92(10)(c) and s. 91(29) of the *Constitution Act, 1867* is to give the federal government the power to declare works to be for the general advantage of Canada and to bring those works within the exclusive jurisdiction of Parliament. Parliament has made an express declaration in s. 18 of the *Atomic Energy Control Act* that all works and undertakings constructed for the production, use and application of atomic energy are works to the general advantage of Canada. It is not contested that Ontario Hydro's nuclear electrical generating stations are works which by definition fall within Parliament's declaration. However, Ontario Hydro and CUPE submit that Parliament's declaration is not valid with respect to nuclear electrical generating stations.

The argument of Ontario Hydro and CUPE, which was accepted by the Divisional Court, is that where identified types of works (such as electrical generating facilities) are specifically assigned to the exclusive jurisdiction of the provinces, the federal declaratory power cannot operate with respect to those works for two reasons. First, the federal declaratory power is authorized only with respect to local works under s. 92(10) which does not include local works which fall under another head of s. 92. Second, the federal declaratory power is a general power which must be read narrowly to exclude those classes of subjects which are assigned exclusively to the provincial legislatures.

With respect to the first reason, the Ontario Court of Appeal rejected Ontario Hydro and CUPE's argument that the declaratory power applies only to works which do not fall within the terms of any other subject matter enumerated in s. 92. The basis on which the Ontario Court of Appeal rejected this argument was that it would result in an absurdity since, for example, s. 92(16) gives the provinces exclusive jurisdiction over all matters of a merely local or private nature in the province. This would mean that the declaratory power could never be exercised because s. 92(16) would prohibit its exercise. I find the response of the Court of Appeal persuasive on this point. I would also point out that the argument of Ontario Hydro and CUPE depends on construing the various heads of power as mutually exclusive watertight compartments and on slotting every matter into one and only one head of power. The watertight compartments approach to the interpretation of ss. 91 and 92 of the *Constitution Act, 1867* has often been rejected by the courts, and rightly so (see, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 180-1).

Ontario Hydro refined its argument before this Court to claim in the alternative that the federal declaratory power applies only to works which do not fall within a category specifically assigned to the provinces, such as electrical generating facilities under s. 92A(1)(c). However, this argument has no merit since under s. 92A(1)(c), it is not the works themselves which are given to provincial jurisdiction, but the conservation, development and management of those works. As the Court of Appeal held, it is an error not to distinguish between activities concerning facilities for the generation of electricity (i.e., development, conservation and management) and the character or nature of those facilities (i.e., being works). It is still open to the federal government to make a declaration that a work of a type specifically mentioned in s. 92A(1)(c) is to the general advantage of Canada, bringing the work under federal jurisdiction. The question, which will be addressed below, is what sort of jurisdiction does the federal government gain over a work mentioned in s. 92A(1)(c) through the operation of such a declaration, given that the provinces have explicitly been assigned the exclusive jurisdiction over the management of those works.

As I mentioned above, Ontario Hydro and CUPE argued that the second reason why works which are specifically identified in s. 92 are not subject to the declaratory power is that the federal declar-

atory power is a general power which must be read narrowly to exclude those classes of subjects assigned exclusively to the provinces. This argument refers to the interpretative process known as the doctrine of mutual modification which was established by the Privy Council in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, where the Privy Council said at pp. 108-9:

With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question at hand.

This method of balancing the provisions in ss. 91 and 92 of the *Constitution Act, 1867* was adopted by this Court in *Reference re Waters and Water-Powers*, *supra*, where Duff J. wrote for the Court (at p. 216):

There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole.

However, as already mentioned, since the works themselves have not been specifically assigned to the provinces under s. 92A(1)(c), there is no apparent conflict between the federal declaratory power and the provincial jurisdiction over management which would require a reading down of the federal declaratory power. Further, given that the very nature of the declaratory power is to enable Parliament to assume jurisdiction over a work which would otherwise be within provincial jurisdiction, it is arguable that the doctrine of mutual modification is of little application to the determination of what works are subject to the federal declaratory power.

Despite the lack of conflict between the federal declaratory power and the provincial power over management, Ontario Hydro argues that Parliament gave up its declaratory power over nuclear electrical generating stations when s. 92A was added to the *Constitution Act, 1867* in 1982. I note that Ontario Hydro, as well as the Ontario Court of Appeal, placed some emphasis on what Parliament must have intended when s. 92A was ratified as part of the *Constitution Act, 1867*. In my view, CUPE is correct in indicating that Tarnopolsky J.A. should not have relied so heavily on the Minutes of the Special Joint Committee on the Constitution in concluding that S. 92A was not meant to diminish the federal declaratory power. However, neither can Ontario Hydro claim that Parliament must be deemed to have known that it was neutralizing its past declarations or its future declaratory power with respect to nuclear electrical generating stations.

This Court has indicated that the Minutes of the Special Joint Committee on the Constitution carry limited weight in the arena of constitutional interpretation (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 509, where Lamer J., as he then was, held with respect to interpreting the *Canadian Charter of Rights and Freedoms* that "it would in my view be erroneous to give these materials anything but minimal weight"). This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution. Rather, in Canada, constitutional interpretation rests on giving a pur-

positive interpretation to the wording of the sections. As Professor Hogg notes in "The Charter of Rights and American Theories of Interpretation" (1987), 25 *Osgoode Hall L.J.* 87, at pp. 97-98:

The principle of progressive interpretation of the constitution is as firmly established in Canada as is the principle of minimal reliance on legislative history. The Supreme Court has repeatedly asserted that the language of the constitution is not to be frozen in the sense in which it would have been understood in 1867. Rather, the constitution is to be regarded as "a living tree capable of growth and expansion within its natural limits".

While the wording of s. 92A is unambiguous that management of electrical generating facilities is within the exclusive jurisdiction of the province, the section does not indicate that any special reservation from the federal declaratory power was made. In my opinion, Parliament did not give up its declaratory power over nuclear electrical generating stations when s. 92A of the *Constitution Act, 1867* was added to the Constitution in 1982.

I would add that these conclusions accord with academic writings on s. 92A which have indicated that the resource amendment, as the section is called, increased provincial power with respect to the raising revenues from resources and to regulating the development and production of resources without diminishing Parliament's pre-existing powers. See R.D. Cairns, M.A. Chandler and W.D. Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986), 24 *Osgoode Hall L.J.* 299, at p 300; and W.D. Moull, "The Legal Effect of the Resource Amendment - What's New in Section 92A", in J.P. Meekison, R.J. Romanow and W.D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (1985), 33, at pp. 53-54.

As I noted above, the scope of federal jurisdiction over the works it makes subject to declarations is not absolute in the context of traditional interpretations of federalism and the declaratory power. Therefore, Ontario Hydro's exhortation that this Court must, by removing certain classes of works from the ambit of the declaratory power, stand firm against the onslaught of federal gutting of all provincial power through the declaratory power loses its force.

The declaration in s. 18 of the *Atomic Energy Control Act* is therefore valid with respect to Ontario Hydro's nuclear electrical generating stations which are works within the definition of that section. This declaration brought Ontario Hydro's nuclear electrical generating stations as works within the jurisdiction of Parliament which, according to the opening words of s. 91 of the *Constitution Act, 1867*, is exclusive jurisdiction. The next question to be addressed is whether or not Parliament's exclusive jurisdiction over Ontario Hydro's nuclear generating facilities as works includes the labour relations of employees employed in those stations.

3. Does a valid declaration by Parliament under s. 92(10)(c) of the *Constitution Act, 1867* over nuclear electrical generating stations give Parliament jurisdiction over the labour relations of employees employed in those stations?

To answer this question, one should begin with the proposition that, generally speaking labour relations is a matter falling under the provincial jurisdiction over property and civil rights found in s. 92(13) on the *Constitution Act, 1867*. This was the conclusion of the Privy Council in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, when they struck down the federal *Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20, which purported to regulate industrial disputes in the mining industry as well as public utilities.

Beginning with the decision of the Court in *Reference re Industrial Relations and Disputes Investigation Act*, *supra*, there came to be recognized a principle that, despite jurisdiction over labour relations being normally a matter under provincial jurisdiction, where federal undertakings were

concerned Parliament obtained legislative authority over labour relations. The rationale behind this principle is that labour relations are an integral part of an undertaking and Parliament cannot effectively regulate an undertaking without control over labour relations. Martland J. held for the Court in *Commission du salaire minimum v. Bell Telephone Co. of Canada*, *supra*, at p. 772:

In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament within s. 91(29).... Similarly, I feel that the regulation and control of the scale of wages to be paid by an interprovincial undertaking, such as that of the respondent, is a matter for exclusive federal control.

This theme was taken up in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, which was the first of the cases in this area to articulate the rules by which the sharing of jurisdiction over labour relations is to be achieved. *Construction Montcalm* concerned the issue of whether provincial minimum wage laws were applicable to the labour relations of a construction company involved in the construction of Mirabel airport on federal Crown land. Beetz J. wrote the reasons for the majority and made the following statement of the law (at pp. 768-69):

The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider*. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *In re the validity of the Industrial Relations and Disputes Investigation Act* (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect to provincial law if the undertaking, service or business is a federal one.

The Court held that there was nothing specifically federal about *Construction Montcalm's* business simply because it was building an airport. Therefore *Construction Montcalm* was not immune from the operation of provincial laws regarding minimum wages and other conditions of employment.

The Court reaffirmed the principles of *Construction Montcalm* in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, where Dickson J. stated since labour relations are integral to the operation of an undertaking, service or business, labour relations will be removed from provincial jurisdiction where federal undertakings are concerned. *Northern Telecom* was appealing the decision of the Canada Labour Relations Board certifying the respondent union as the bargaining agent for a unit of *Northern Telecom's* installation supervisors. The Court was unable to determine the nature of *Northern Telecom's* business on the evidence before the Court, and dismissed *Northern Telecom's* appeal on the ground that *Northern Telecom* had failed to show reversible error by the Canada Labour Relations Board.

The most recent series of cases in this area is the trilogy of *Bell Canada*, *Courtois* and *Alltrans Express*, *supra*. Again, these decisions emphasized that, where a federal undertaking is concerned, jurisdiction over labour relations will fall to the federal government. As Beetz J. held in the lead case of the trilogy, *Bell Canada*, *supra*, at pp. 761-62:

Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a., b. and c. of the *Constitution Act, 1867*, that is undertakings such as *Alltrans Express Ltd.*, *Canadian National* and *Bell Canada*.

Although these cases concluded that federal jurisdiction over labour relations automatically flows from federal jurisdiction over an undertaking because labour relations are an integral part of the management of an undertaking, they are not dispositive of the case at bar for two reasons. First, we are concerned here with works and not undertakings, and the parties have conceded that Ontario Hydro is a provincial undertaking. Second, the Court must consider the effect of the explicit grant of authority to the provinces in s. 92A over management of electrical generating facilities.

However, the cases I have just discussed do provide the general analytic framework within which to determine who has jurisdiction over labour relations at Ontario Hydro's nuclear electrical generating facilities. The question to be answered is whether or not federal authority over labour relations is integral to the exercise of federal competence over the nuclear electrical generating plants as works declared to be to the general advantage of Canada. As I see it, answering this question in turn raises three additional questions. In the first place, what is the character of labour relations, both generally and in the context of nuclear generating of electricity? Secondly, what is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations? And finally, what is the effect of s. 92A?

As to the first question, I note at the outset that the Ontario and federal labour codes are substantially similar. Indeed, labour codes across Canada largely correspond to one another. As George Adams (now Mr. Justice Adams) has noted:

Obviously not all provisions are identical; each jurisdiction has included in its won legislation measures which reflect or are designed to respond to the economic political and cultural forces peculiar to it. Nevertheless, the over-all tenor of the legislative enactments throughout Canada remains remarkably similar.

(Canadian Labour Law (2nd ed. 1993), at p. 2-94.)

Canadian labour legislation is concerned with developing procedures for the interaction between management and employees. Each code governs the rules under which unions are certified as bargaining agents, under which collective agreements are negotiated, and under which strikes and lockouts may proceed legally. There is usually no prescribed content to collective agreements, except that the agreement be for a definite term and that it contain a method for settling disputes during the life of the agreement.

Of course, the form that Canadian labour legislation has taken is only one consideration in describing the character of labour relations as a matter for constitutional purposes. It may be said that labour relations law is generally concerned with the regulation and control of industrial disputes, and not with the unique concerns of individual industries except where industry-specific measures have been enacted. It is also apparent that Canadian labour law is concerned with the equalization of power between workers and employers to protect workers from the arbitrary exercise of authority. Professor David M. Beatty has asserted that this latter goal of labour legislation has become paramount in Canadian labour law:

Whereas the earlier regulation was directed primarily to securing a balance of interests favourable to employers and consumers, in our own time legislators have been more concerned to promote and protect the interests a worker has in his or her job. Instead of procuring labour peace in the community by legal sanctions of criminal and civil liability, in more recent times it has been purchased by legislation aimed at enhancing the opportunity for self-control.

Taken together, all the laws we have come to rely upon to regulate and coordinate work activities

in our community, can be seen as providing more extensive forms of protection for workers against arbitrary authority.

(*Putting the Charter to Work* (1987), at p. 41.)

Thus, there are two primary features to labour relations: the preservation of industrial peace and the empowerment of workers. It remains to be seen whether or not these features make the legislative control of labour relations integral to Parliament's effective exercise of its jurisdiction over the nuclear plants of Ontario Hydro.

The second question is the nature of Parliament's competence over Ontario Hydro's nuclear electrical generating stations. When Parliament made the declaration in s. 18 of the *Atomic Energy Control Act* the federal government obtained exclusive jurisdiction over the specifically federal aspects of nuclear electrical generating stations such as those owned and operated by Ontario Hydro. The preamble to the *Atomic Energy Control Act* provides a statement of the federal interest in atomic energy. That statement also provides the parameters of the federal interest in the operations of the nuclear electrical generating facilities since the preamble effectively defines what Parliament determined to be to the general advantage of Canada with respect to the means of production of atomic energy. I reproduce the preamble for convenience:

Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in the measures of international control of atomic energy that may hereafter be agreed on...

There is nothing in this statement, nor in the rest of the *Act*, that explicitly or implicitly reveal a federal interest in regulating labour relations. It is apparent from the *Atomic Energy Control Act* that the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns.

The terms of the *Atomic Energy Control Act* are relevant to determining what Parliament itself determined was integral to the exercise of its jurisdiction over atomic energy. So too are the terms of the regulatory scheme put in place under the *Act*. Nothing in these regulations indicates any interest in labour relations. Indeed, the mandatory licences for facilities which use nuclear fuel to produce electricity contemplate reporting labour disturbances, but are silent on the need for federal control over labour disputes. Of course, with respect to Parliament's intent, it may be argued that s. 4 of the *Canada Labour Code* proclaims all works declared to the general advantage of Canada to be subject to federal labour laws. Obviously a more detailed inquiry into the relationship between Parliament's jurisdiction over the works in question and the matter of labour relations must be undertaken.

This inquiry must proceed in the light of the third question, namely what is the effect on this issue of s. 92A of the *Constitution Act, 1867*. This section of the Constitution grants to the provinces the exclusive jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" (emphasis added). Ontario Hydro's nuclear electrical generating facilities fall within this provision of the *Constitution Act, 1867*. Past jurisprudence, such as *Bell Canada, supra*, has held that regulation of labour relations is integral to the regulation of the management of an undertaking. This strengthens the presumption of provincial jurisdiction over labour relations in the specific context of this case since Ontario has been given constitutional jurisdiction over the management of works such as Ontario Hydro's nuclear electrical generating sites.

I emphasize that the province's jurisdiction over the management of the nuclear electrical generat-

ing stations does not come by way of a unilateral statutory assertion. Section 92A of the *Constitution Act 1867* is an explicit constitutional statement of jurisdiction, and not a self-serving assertion of jurisdiction. There is no higher authority for the interpretation of the federal declaratory power in the specific circumstances of this case than another provision of the Constitution, namely s. 92A. The specific constitutional grant to the provinces of jurisdiction over the management of electrical generating stations combines with both the presumption that labour relations fall to the provinces and the fact that Ontario Hydro as a whole is a provincial undertaking to weigh heavily against a finding that the federal government exercises the type of jurisdiction over the nuclear electrical generating plants such that control over labour relations is federal.

In view of the answers to these three questions, can control of labour relations be said to be integral to the effective exercise of federal jurisdiction over Ontario Hydro's nuclear electrical generating stations? Unfortunately, the record is almost non-existent on the practical necessity of control by one jurisdiction or the other over labour relations in this particular case. Provincial labour laws have been applied to some of the employees at one of Ontario Hydro's nuclear plants without any problem for 25 years. However, that evidence cannot be conclusive in determining constitutional jurisdiction over the labour relations of all the employees employed at the nuclear plants, including the scientific and engineering employees. The Attorney General of Canada has filed no evidence on this point since its position is that it need not justify its control over labour relations at a federally declared work. Ontario Hydro filed several affidavits from company officials purporting to address the problems that divided jurisdiction over labour relations within the company would rise. But again, these affidavits are not dispositive of the issue, particularly since the official's only complaint is that divided jurisdiction would create uncertainty.

I am therefore faced with the difficult task of determining jurisdiction over labour relations in this case with the help of very little evidence. I stated above that the federal interest in Ontario Hydro's nuclear electrical generating stations is the fact of nuclear production and its attendant health and safety concerns. I also concluded that labour relations legislation is generally concerned with regulating the process of industrial relations and aims at securing both industrial peace and better working conditions for workers. In the context of labour relations, the safety of workers and of the public appears to be the most significant of the federal government's interests. Therefore,, I have tried to consider those labour relations issues which could impact on the safe operation of the plant. In my opinion, there are two potential concerns. First, a collective agreement negotiated under provincial labour legislation might contain provisions which would interfere with the staffing requirements in the *licences* issued under *Atomic Energy Control Act*. Second, a lockout by Ontario Hydro or other work stoppage under provincial labour law could threaten the safe operation of the plant. Both of these concerns appear to me to be easily addressed.

Section 8 of the *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365, forbids the operation of a nuclear facility except in accordance with a licence issued by the AECB. The licences issued by the AECB may contain such conditions as the AECB deems necessary "in the interests of health, safety and security" (s.9(2)). The licences issued to Ontario Hydro set out a variety of such conditions (see generally pp. 501-9 C.O.A.). Staffing and organization of the nuclear plants must conform with a specified organization plan that is filed with the AECB. Any changes to that plan must be reported to the AECB. The AECB must approve in writing staffing of certain management and supervisory positions. The licence also specifies minimum staffing levels to ensure the safe operation of the nuclear facility, as well as the training that some employees are required to receive. Finally, there are requirements that any concerns affecting the safety or security of the plant must be reported to the AECB.

Any collective agreement provision that contravened these conditions, imposed pursuant to a valid

federal regulation over a federal aspect of the nuclear facility, would be null and void because the provisions of the federal licence would be paramount. Valid federal legislation regarding nuclear plants would paramount over provincial legislation and collective agreements reached pursuant to provincial legislation, as counsel for Ontario Hydro and the society conceded in their oral submissions. The double aspect doctrine applies here. The federal licence, federal regulations and the *Atomic Energy Control Act* are in pith and substance directed towards the regulation of the safety of nuclear electrical generating facilities and the effective control of the development and use of reactors. The Ontario *Labour Relations Act* is in pith and towards the regulation of the substance directed towards the regulation of the relations between employees and employers. The two can operate concurrently, except in cases of outright conflict in which case the provisions of the federal law would apply under the doctrine of paramountcy.

Further, on a practical level, if a collective agreement led to the violation of the licence conditions, the AECB could shut the plant down by revoking or suspending the licence under which the plant operates (see ss. 27 and 28 of the *Atomic Energy Control Regulations*).

The evidence does not disclose that work stoppages represent a significant threat to safety. The licences under which Ontario Hydro's nuclear electrical generating stations operate seem to allow for work stoppages: the licences require the reporting of any actual or impending industrial disputes "which could affect the safety or security of the nuclear facility" (C.O.A., at p. 505). The licences do not prohibit work stoppages. Further, the affidavit of Ontario Hydro's Senior Vice-President of Operations outlines the practical concerns the company must face in the event of an imminent strike. This affidavit suggests that a temporary shut-down in the event of a strike, while undesirable, is a response that would preserve public safety in extreme cases.

As a result, federal control of labour relations does not appear to be integral to the effective regulation of the federal government's concerns with respect to Ontario Hydro's nuclear electrical generating facilities. Both staffing and work stoppages would be tempered by the conditions of the licences issued by the Federal AECB. Moreover, if specific safety issues were of concerns to the federal government, it could legislate with respect to those issues under its valid interest in safety flowing from its jurisdiction over the declared works. This would result in some trenching on provincial powers over labour relations and the management of electrical generating sites. However, the necessary trenching on provincial jurisdiction is much more in harmony with the principles of federalism than is the wholesale withdrawing of labour relations from provincial jurisdiction.

As I discussed above, the conclusion that labour relations is not integral to the exercise of federal jurisdiction is only strengthened by the presence of s. 92A of the *Constitution Act, 1867*. This section expressly provides for provincial jurisdiction over the management of electrical generating sites, including those fuelled by nuclear reactors. Provincial control over labour relations appears to me to be integral to provincial jurisdiction over the management of nuclear electrical generating facilities. Further, as accepted by everyone, Ontario Hydro as a whole is a provincial undertaking. In this regard, I would adopt the reasoning of Galligan J.A., who dissented in the Ontario Court of Appeal. In discussing the trilogy of cases headed by *Bell Canada*, Galligan J.A. stated as follows (at p. 774):

I made earlier reference to what seems to me to be a fundamental distinction between the situation in the trilogy of cases and the situation in this case. Those undertakings were truly national while this is undoubtedly provincial. The general language used by Beetz J. in those cases must be considered in that context and care should be taken so that they are not taken out of context and given a meaning which was not intended. His finding that labour relations is a vital part of management can indicate, quite apart from the ordinary principle that labour relations is a provincial matter, that labour relations is an integral, essential and vital part of the management of a provincial undertaking and the provincial power to legislate respecting a provincial undertaking.

ing must include the corresponding legislative power to regulate its labour relations. Thus for the same reason that labour relations of a federal undertaking must be regulated federally I think that labour relations of a provincial undertaking should be regulated provincially.

In conclusion, I am of the view that, notwithstanding s. 4 of the *Canada Labour Code*, *supra*, a valid declaration by Parliament under s. 92(10)(c) of the *Constitution Act, 1867* over nuclear electrical generating stations does not give Parliament jurisdiction over the labour relations of employees employed in those stations. Put another way, at issue herein are works not undertakings and as Hugessen J.A. said in *Central Western Railway Corp. v. U.T.U.*, [1989] 2 F.C. 186, at p. 214, works, being physical things, do not have labour relations, but undertakings do. Control of labour relations is not integral to the federal interest in the nuclear plants. Indeed, it may be said on the contrary that, because of s. 92A of the *Constitution Act, 1867* and the fact that Ontario Hydro is a provincial undertaking, control of labour relations is integral to the exercise of provincial jurisdiction over the nuclear electrical generating facilities. This result accords with the jurisprudence and the underlying principles that apply to federalism in general and the declaratory power in particular.

4. *If Parliament's jurisdiction over nuclear electrical generating stations derives solely from the peace, order and good government clause of s.91 of the Constitution Act, 1867, does that jurisdiction include the labour relations of employees employed in those stations?*

It is not disputed in this case that Parliament has jurisdiction over atomic energy and therefore the power to enact the *Atomic Energy Control Act* under the p.o.g.g. power in the opening words to s. 91 of the *Constitution Act, 1867*. The Attorney General of Canada argued that, if Parliament's jurisdiction over Ontario Hydro's nuclear electrical generating stations through the declaration in s. 18 of the *Atomic Energy Control Act*, *supra*, does not extend to labour relations, Parliament can regulate labour relations at the facilities through the exercise of its jurisdiction over atomic energy under the p.o.g.g. power. In my view, the answer to whether Parliament's jurisdiction under the p.o.g.g. power over Ontario Hydro's nuclear electrical generating plants extend to labour relations must be based on principles similar to those I applied in discussing the declaratory power. Both the p.o.g.g. power and the declaratory power are unusual in the division of powers scheme, and it is logical to apply the same balancing principles of federalism to both, absent special circumstances.

There are two recognized doctrines under the p.o.g.g. power which are relevant to this appeal: the emergency doctrine and the national concern doctrine. Under the emergency doctrine, Parliament may use its p.o.g.g. powers to enact legislation that would normally be *ultra vires* to combat a national emergency (see generally *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373). The type of legislation permissible under the emergency doctrine will be temporary in nature (*R. v. Crown Zellerbach Canada Ltd.*, *supra*, at p. 432).

The Court developed the parameters of the national concern doctrine of the p.o.g.g. power in *Crown Zellerbach*. In his reasons for the majority, Le Dain J. described the following contours of the national concern doctrine (at pp. 431-32):

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial con-

cern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

With regard to the last factor, the “provincial inability” test, Le Dain J. hastened to caution that the test “must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem” (p.434). Therefore, that the federal government may have jurisdiction over atomic energy by reason of the national concern branch of the p.o.g.g. power does not give Parliament plenary power over all aspects of nuclear power.

The p.o.g.g. power, like all of Parliament’s powers, must be interpreted in accordance with the specific grants of power to the provinces under ss. 92 and 92A of the *Constitution Act, 1867*. While there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, the extent of what is swept within Parliament’s jurisdiction is circumscribed to the national concern aspects of atomic energy which would appear to be the same as those aspects of the nuclear electrical generating stations which render them to the general advantage of Canada, namely the fact of nuclear production and its safety concerns.

I concluded above that Parliament does not require control over labour relations at Ontario Hydro’s nuclear electrical generating stations in order to exercise effectively its jurisdiction over the works through the declaratory power. Similarly, it is not integral to the exercise of the p.o.g.g. power over atomic energy that Parliament regulate the labour relations of employees employed at Ontario Hydro’s nuclear electrical generating stations.

To allow Parliament to control labour relations at these facilities where such regulation is not integral to the effective securing of Parliament’s interest in the facilities would not be reconcilable with the distribution of legislative powers under which the provinces are accorded jurisdiction over both property and civil rights, including labour relations, and the management of electrical generating facilities. To define the federal jurisdiction under the p.o.g.g. power in this case to include labour relations would render the provincial power to manage the facilities meaningless since labour relations and management are “two elements of the same reality” (*Bell Canada, supra*, at p. 798). This would not have “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (*Crown Zellerbach supra*, at p. 432).

The Attorney General of Canada cited *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.), as authority that Parliament’s jurisdiction over atomic energy under the p.o.g.g. power extends to the labour relations of workers employed in the atomic energy industry. In *Pronto*, the Canadian Mine Workers Union applied to the OLRB for certification as the bargaining agent for the employees of two mining companies engaged in the mining and concentrating of uranium ores. The OLRB certified the union and the companies applied for an order to quash the certification decision on the ground that the OLRB had no jurisdiction to hear the application. The companies argued that the federal *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, was applicable to their employees. McLennan J. held that control of atomic energy fell within the federal p.o.g.g. power and that “it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament” (pp. 869-70).

Pronto was decided prior to the decision of this Court in *Crown Zellerbach*, *supra*, under which the present p.o.g.g. claim falls to be decided. Further, the judgment in *Pronto* is not supported by any reasons and does not accord with decisions of this Court which have indicated that federal and provincial powers must accommodate one another to the extent possible. Finally, it appears that the parties in *Pronto* conceded that if the mine fell within federal jurisdiction in some aspect then federal labour laws applied (at p. 868). Because of the structure of the parties' arguments, the result in the case was a foregone conclusion once federal jurisdiction over atomic energy was established. For these reasons, *Pronto* does not provide authority for the Attorney General of Canada's claim that through the p.o.g.g. power Parliament has jurisdiction over the labour relations at Ontario Hydro's nuclear electrical generating facilities.

In summary, while Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, that jurisdiction does not extend to the labour relations between Ontario Hydro and those of its employees employed in the nuclear electrical generating stations. The federal government does not require control over labour relations at Ontario Hydro's nuclear facilities for the exercise of jurisdiction over atomic energy. In other words, the labour relations at issue in this case are not part of the single, distinctive and indivisible matter identified as atomic energy. This is not the say, however, that Parliament, where circumstances warrant, may not, in exercising its valid jurisdiction over nuclear energy, enact legislation which has an impact on the labour relations of Ontario Hydro's employees under either the national concern branch or the national emergency branch of the power to legislate for the peace, order and good government of Canada.

5. *Is Ontario Hydro immune from the operation of the Canada Labour Code by virtue of interjurisdictional Crown immunity?*

In view of the conclusion I have reached that it is the Ontario *Labour Relations Act* and not the *Canada Labour Code*, which constitutionally applies in the circumstances of this case, it is not strictly necessary that I address this question. Nonetheless, I am of the opinion that had I reached a different conclusion on the applicability of the *Canada Labour Code*, Ontario Hydro would not be immune from the operation of federal labour legislation.

The Divisional Court held that Ontario Hydro was a public policy instrument to which the *Canada Labour Code* should not be interpreted to apply unless the Code expressly and specifically states that it does apply. I respectfully disagree. There is no jurisprudence indicating that a company like Ontario Hydro, described by the Divisional Court as a "provincial public policy instrument" (at p. 279 O.R.) and which the parties agreed is not a Crown agent, is entitled to interjurisdictional Crown immunity. Based on the arguments submitted on this issue, I see no reason to create a new category of interjurisdictional Crown immunity for a species of organization known as a public policy instrument. Therefore, I agree with the Attorney General of Canada's submission that Ontario Hydro stands on no higher footing than would any other employer in the province of Ontario, in so far as immunity from federal legislation is concerned.

VII. Conclusion

The federal government exercises exclusive jurisdiction over some aspects of Ontario Hydro's nuclear electrical generating facilities through its declaratory and p.o.g.g. powers. However, control of labour relations at those facilities is not integral to Parliament's effective regulation of the sites in terms of its interest in those sites. Therefore, in answer to the constitutional question, it is the Ontario *Labour Relations Act* which constitutionally applies to the labour relations between Ontario Hydro and those of its employees at its nuclear electrical generating facilities.

VIII. Disposition

For the foregoing reasons, I would allow the appeals, set aside the order of the Ontario Court of Appeal, and restore the order of the Divisional Court except the mandamus. Under the circumstances, I would award costs only in this Court to Ontario Hydro, CUPE and the Society, to be paid by the Attorney General of Canada.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0922-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tarcon Ltd. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Tarcon Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Tarcon Ltd. in all sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville; and the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

0723-92-R: Local 47 Sheet Metal Workers' International Association (Applicant) v. Marc Mechanical Limited (Respondent)

Unit: "all journeymen sheet metal workers and registered apprentices in the employ of Marc Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Marc Mechanical Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

1140-92-R: Practical Nurses Federation of Ontario (Applicant) v. Englehart & District Hospital Inc. (Respondent)

Unit: "all employees of Englehart and District Hospital employed as registered or graduate nursing assistants in the Town of Englehart, save and except head nurses and persons above the rank of head nurse" (15 employees in unit)

2610-92-R: Practical Nurses Federation of Ontario (Applicant) v. Wingham and District Hospital (Respondent)

Unit: "all employees employed as registered or graduate nursing assistants by the Wingham and District Hospital in the Town of Wingham, save and except Nursing Co-ordinators and persons above the rank of Nursing Co-ordinator" (50 employees in unit)

3012-92-R: United Steelworkers of America (Applicant) v. Shrader Canada Limited (Respondent)

Unit: "all employees of Shrader Canada Limited in the town of Oakville, save and except supervisors, persons above the rank of supervisors, office, clerical, technical and sales staff" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0695-93-R: Ontario Public Service Employees Union (Applicant) v. Trent University (Respondent)

Unit: "all non-academic employees of Trent University in the City of Peterborough, save and except supervisors and persons above the rank of supervisor, employees for whom any trade union held bargaining rights as of May 27, 1993, President, Vice-Presidents, Deans, Associate Deans, College Heads, research assistants, research technicians and post-doctoral fellows, students including graduate students, University Secretary and Secretary to the Board of Governors, Directors of Human Resources, Athletics, Communications, Physical Resources, Finance, Alumni Affairs, Computer Services, Assistant Directors, Registrar, Associate Registrar, Assistant Registrars, Assistant to the Dean of Arts and Science, Manager of the Bookstore, Manager of Facility Services, Manager Accounting Services, Telecommunications Manager, Co-ordinator of Counselling, Budget Officer, Operations Engineer, Academic Counsellor and Administrative Assistant, Secretaries to the President's Office, Assistant University Secretaries, Physical Resources Assistant, University Librarian, Executive Secretary to the VP Administration and Finance, Administrative Assistant Dean's Office, Security Guards, Board of Governor appointees during such term, Director of Student Health Services, Manager Purchasing Services, Manager Audio-Visual Services, VAX Systems Manager, Communications Officer, College Assistants, Library Administrative Assistant, Executive Secretary to the Vice-President (University Services), Health and Safety Officer, Payroll Authorization and Administrative Secretary, Human Resources Administrative Assistant and Secretary, Payroll Supervisor, Payroll Clerk, Data Entry Clerk Human Resources, Administrative Secretary/Assistant Athletics, Administrative Secretary Dean's Office, Administrative Secretary University Secretariat, and Members of the professions of law, dentistry, architecture, medicine, engineering, land surveying, accounting and horticulture" (225 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0828-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, truck drivers, labourers, carpenters and carpenters' apprentices in all sectors of the construction industry in the Townships of MacMurchy, Natal, Kelvin, Churchill, Asquith, Fawcett, Leonard, Tyrrell and Knight, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) (*Having regard to the agreement of the parties*)

0880-93-R: United Steelworkers of America (Applicant) v. Circle-Inn Limited (Respondent)

Unit: "all employees of Circle-Inn Limited in the City of Thunder Bay, save and except Manager and persons above the rank of Manager" (30 employees in unit)

0914-93-R: Ontario Public Service Employees Union (Applicant) v. W.J. Stelmaschuk & Associates Ltd. (Respondent)

Unit: "all employees of W.J. Stelmaschuk & Associates Ltd. in the Town of Gravenhurst, save and except Administrative Assistant, Senior Supervisor and persons above the rank of Senior Supervisor" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1071-93-R: International Brotherhood of Electrical Workers (Applicant) v. Dana Manor (Respondent)

Unit: "all employees of Dana Manor in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor, Professional Medical Staff, Paramedical Staff and persons for whom any trade union held bargaining rights as of June 24, 1993" (12 employees in unit)

1091-93-R: United Steelworkers of America (Applicant) v. Hawk Security Systems Ltd. (Respondent) v. Wackenhut of Canada Limited (Intervener)

Unit: "all employees of Hawk Security Systems Ltd., at 240 Attwell Drive, 251 Attwell Drive, 254 Attwell Drive, 255 Attwell Drive and 27 Marmac Drive in the Municipality of Metropolitan Toronto, save and except General Manager and persons above the rank of General Manager" (11 employees in unit)

1136-93-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. R. Periard Electric Ltd. (Respondent)

Unit: "all electricians and apprentice electricians in the employ of R. Periard Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and apprentice electricians in the employ of R. Periard Electric Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1372-93-R: International Brotherhood of Electrical Workers (Applicant) v. MacQuilly Inc. o/a Victoria Manor (Respondent) v. Service Employees' Union, Local 210 (Intervener)

Unit: "all employees of MacQuilly Inc. o/a Victoria Manor in the City of Windsor, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of July 22, 1993" (7 employees in unit)

1392-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn, Windsor (Respondent)

Unit #1: "all employees of Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn, Windsor, at its Ramada Inn, Windsor in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week" (52 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

1441-93-R: United Food & Commercial Workers Union Local 175 (Applicant) v. The Amazing Food Service "1992" Inc. (Respondent)

Unit: "all employees of The Amazing Food Service "1992" Inc. in the Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager" (19 employees in unit)

1444-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Crane Canada Inc. (Respondent)

Unit #1: "all employees of Crane Canada Inc. at its Crane Supply Division in the City of Ottawa, save and except supervisors, those above the rank of supervisor, office and clerical staff, sales staff and students" (15 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all office and clerical employees of Crane Canada Inc. at its Crane Supply Division in the City of Ottawa, save and except supervisors, those above the rank of supervisor, sales staff and students" (8 employees in unit) (*Having regard to the agreement of the parties*)

1491-93-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Getsco Technical Services Inc. (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of Getsco Technical Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers' apprentices in the employ of Getsco Technical Services Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1546-93-R: Brewery General and Professional Workers' Union (Applicant) v. Randall Klein Design Inc. (Respondent) v. Group of Employees (Interveners)

Unit: "all employees of Randall Klein Design Inc., in the City of London, save and except supervisors, persons above the rank of supervisor and office staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

1553-93-R: Retail, Wholesale & Department Store Union, AFL, CIO, CLC (Applicant) v. Oil and Industry Suppliers (Can.) Ltd. (Respondent)

Unit #1: “all employees of Oil and Industry Suppliers (Can.) Ltd. in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, dispatchers and dependent contractors” (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all dependent contractors of Oil and Industry Suppliers (Can.) Ltd. in the Regional Municipality of Sudbury, save and except those dependent contractors working in and out of Branch 42” (3 employees in unit) (*Having regard to the agreement of the parties*)

1554-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Inc. (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Ontario Paving Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the employ of Ontario Paving Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

1555-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Ontario Paving Inc. (Respondent)

Unit: “all construction labourers in the employ of Ontario Paving Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit)

1567-93-R: Niagara Bronze Employees’ Association (Applicant) v. Niagara Bronze Limited (Respondent)

Unit: “all employees of Niagara Bronze Limited in the City of Niagara Falls, save and except foremen, persons above the rank of foreman, sales and office staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

1569-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: “all employees of Domclean Limited employed at Market Tower, 149 Dundas Street, London, Ontario, save and except non-working forepersons and persons above the rank of non-working foreperson” (4 employees in unit) (*Having regard to the agreement of the parties*)

1584-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at 2360 Dixie Road, in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1585-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at 95 Moatfield Drive and 105 Moatfield

Drive, in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (8 employees in unit) (*Having regard to the agreement of the parties*)

1586-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at 81 Turnberry Avenue, in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1605-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. employed in the Municipality of Metropolitan Toronto at the following locations: 200 Church Street, Etobicoke; 101 Subway Crescent, Etobicoke; 300 Danforth Road, Scarborough; 14 St. Matthews Road, Toronto; 1555 Finch Avenue East, North York; 1 Ripley Avenue, Toronto; 1 Toronto Street, Toronto; 74 Victoria Street, Toronto; 1155 Leslie Street, Don Mills; 117 Gerrard Street East, Toronto and at 7805 Bayview Avenue in the Town of Markham, save and except supervisors and persons above the rank of supervisor” (65 employees in unit) (*Having regard to the agreement of the parties*)

1623-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1624-93-R: IWA-Canada (Applicant) v. Goulard Lumber (1971) Ltd. (Respondent)

Unit: “all employees of Goulard Lumber (1971) Ltd. at its sawmill, planing mill, and mill yards in the Township of Springer, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (41 employees in unit) (*Having regard to the agreement of the parties*)

1626-93-R: Canadian Union of Public Employees (Applicant) v. Kerry’s Place (Scott’s Place Group Home) (Respondent)

Unit: “all employees of Kerry’s Place (Scott’s Place Group Home) in the Township of Scugog in Durham Region, save and except the Program Director, persons above the rank of Program Director and Secretary to the Program Director” (22 employees in unit) (*Having regard to the agreement of the parties*)

1629-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 222 St. Patrick Street in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1631-93-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. CompAS Electronics Inc. (CompAS) (Respondent)

Unit: “all employees of CompAS Electronics Inc. (CompAS) in the City of Brockville, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and administrative staff, customer service representatives, outside sales staff and purchasing staff” (131 employees in unit) (*Having regard to the agreement of the parties*)

1643-93-R: United Steelworkers of America (Applicant) v. Land O’Lakes Community Services (Respondent)

Unit: “all employees of Land O’Lakes Community Services c.o.b. as Pine Meadow Nursing Home in the Township of Kaladar, Anglesea and Effingham, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (41 employees in unit) (*Having regard to the agreement of the parties*)

1656-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cutline International Limited (Respondent)

Unit: "all construction labourers, in the employ of Cutline International Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1657-93-R: Ontario Public Service Employees Union (Applicant) v. Community Living Huntsville (Respondent)

Unit: "all employees of Community Living Huntsville in the Town of Huntsville, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (51 employees in unit) (*Having regard to the agreement of the parties*)

1658-93-R: The Christian Labour Association of Canada (Applicant) v. The Governing Council of the Salvation Army in Canada (Respondent)

Unit: "all employees of The Governing Council of the Salvation Army Canada in the City of St. Catherines in its warehousing and store operations at 203 Church Street, save and except supervisors and persons above the rank of supervisor" (19 employees in unit) (*Having regard to the agreement of the parties*)

1669-93-R: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: "all employees of The Brick Warehouse Corporation in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1670-93-R: Ontario Nurses' Association (Applicant) v. Sherwood Park Manor Inc. (Respondent)

Unit: "all registered and graduate nurses employed by Sherwood Park Manor Inc. in the County of Leeds and Grenville, save and except Director of Nursing and persons above the rank of Director of Nursing" (8 employees in unit) (*Having regard to the agreement of the parties*)

1673-93-R: Teamsters Local 847 Laundry and Linen Drivers and Industrial Workers (Applicant) v. Rank Canada Inc. carrying on business as Mayfair Bingo (Respondent)

Unit: "all employees of Rank Canada Inc. carrying on business as Mayfair Bingo at 525 Wilson Avenue in the Municipality of Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

1679-93-R: Canadian Union of Public Employees (Applicant) v. Faywood Blvd. Childcare Centre (Respondent)

Unit: "all employees of Faywood Blvd. Childcare Centre in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director and persons for whom any trade union held bargaining rights as of August 23, 1993" (5 employees in unit) (*Having regard to the agreement of the parties*)

1684-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Motors of Canada Limited (Respondent)

Unit: "all Security Officers of General Motors of Canada Limited in the City of Woodstock, save and except Sergeants, persons above the rank of Sergeant and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

1685-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Adelaide Maintenance Limited (Respondent)

Unit: "all employees of Adelaide Maintenance Limited employed at 145 King Street West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1686-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited employed at 248, 252, 254 and 256 Pall Mall Street in the City of London, save and except non-working supervisors, persons above the rank of non-working supervisor, office and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

1691-93-R: Frontier Construction Employees Association (Applicant) v. Frontier Corp. (Respondent)

Unit: "all employees of Frontier Corp. in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and clerical staff" (17 employees in unit) (*Having regard to the agreement of the parties*)

1697-93-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Plusar Equipment Ltd. (Respondent)

Unit: "all employees of Plusar Equipment Ltd. in the City of Vaughn, save and except supervisors, persons above the rank of supervisors, office, engineering, technical and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

1728-93-R: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Anselma House (Respondent)

Unit: "all employees of Anselma House in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1729-93-R: Ontario Public Service Employees Union (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent)

Unit: "all employees of the Marriott Corporation of Canada Ltd. engaged in cleaning services at Mohawk College Wentworth and Fennel campuses in the Regional Municipality of Hamilton-Wentworth, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons for whom any trade union held bargaining rights as of August 23, 1993" (10 employees in unit) (*Having regard to the agreement of the parties*)

1731-93-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Mico Inc. (Respondent)

Unit: "all employees of Mico Inc. c.o.b. Loeb Club Plus, Westminster, in the City of Windsor, save and except managers and persons above the rank of manager" (157 employees in unit)

1736-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Parkway Concrete Supply Ltd. (Respondent)

Unit: "all employees of Parkway Concrete Supply Ltd. in the County of Essex, save and except managers and persons above the rank of manager, office and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1745-93-R: United Steelworkers of America (Applicant) v. Twigg Property Management Company Limited (Respondent)

Unit: "all security employees of Twigg Property Management Company Limited at 1 Adelaide Street East, 25 Adelaide Street East, 20 Victoria Street and 44 Victoria Street in the Municipality of Metropolitan Toronto, save and except Security Supervisor and persons above the rank of Security Supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1752-93-R: Teamsters Local 847, Laundry and Linen Drivers and Industrial Workers (Applicant) v. 700854 Ontario Limited (Respondent)

Unit: "all employees of 700854 Ontario Limited c.o.b. Bingo Country at 821 Runnymede Avenue in the Municipality of Metropolitan Toronto, save and except assistant supervisors, persons above the rank of assistant supervisor, clerical staff and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

1763-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Applicant) v. Nissho Iwai Canada Ltd. (Respondent)

Unit: "all employees of Nissho Iwai Canada Ltd. in the Town of Ingersoll, save and except supervisors, persons above the rank of supervisor, office and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1764-93-R: IWA - Canada (Applicant) v. Isadore Roy Limited (Respondent)

Unit: "all employees of Isadore Roy Limited at its sawmill, planning mill, mill yards in the Township of Rater, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, watch staff and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

1766-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at E.C. Row Yard, 5500 North Service Road and the Ford Plant at Crawford Avenue and Tecumseh Road, in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

1767-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at the Kent County Courthouse, 21 Seventh Street, in the City of Chatham, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1768-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited in the Mail Sorting Plant at 4255 Walker Road in the City of Windsor, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

1774-93-R: Canadian Union of Public Employees (Applicant) v. Marianhill (Respondent)

Unit: "all Registered Nurses employed by Marianhill Home For The Aged in the City of Pembroke, save and except Charge Nurse, persons above the rank of Charge Nurse and employees in bargaining units for whom any trade union held bargaining rights as of August 31, 1993" (24 employees in unit) (*Having regard to the agreement of the parties*)

1777-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited employed at Kellogg Canada Inc., 100 Kellogg Lane, in the City of London, save and except non-working supervisors, persons above the rank of non-working supervisor, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

1778-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. J & W Corp. o/a ServiceMaster Contract Services of London (Respondent)

Unit: "all employees of J & W Corp. operating as ServiceMaster Contract Services of London employed at 680 Waterloo Street in the City of London, save and except non-working supervisors and persons above the rank of non-working supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

1799-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all Security Guards of Intertec Security & Investigation Ltd. working at 195 Belfield Road in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1804-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all Security Guards of Intertec Security & Investigation Ltd. in the Municipality of Metropolitan Toronto, working at 1015 Lakeshore Boulevard East and 1 Front Street, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1805-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: "all employees of Ontario Guard Services Inc. in the Municipality of Metropolitan Toronto working at 2121 Markham Road and 85 St. Clair Avenue East, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

1811-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 50 and 60 Inverlocky Boulevard in the Municipality of Metropolitan Toronto, save and except patrol supervisors and persons above the rank of patrol supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1813-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Dane Furnishings Limited (Respondent)

Unit: "all employees of Dane Furnishings Limited c.o.b. as Dominion Furniture Rental in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

1814-93-R: Ontario Nurses' Association (Applicant) v. Pleasant Rest Nursing Home Limited (Respondent)

Unit: "all Registered and Graduate Nurses employed by Pleasant Rest Nursing Home Limited in the County of Prescott, save and except Directors of Nursing and persons above the rank of Director of Nursing" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1820-93-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, Affiliated with the International Brotherhood of Teamsters, AFL-CIO (Applicant) v. The Salvation Army Toronto Addictions and Rehabilitation Centre, Industrial Services (Respondent)

Unit: "all employees of The Salvation Army Toronto Addictions and Rehabilitation Centre, Industrial Services in the Municipality of Metropolitan Toronto, save and except assistant supervisors/dispatchers and persons above the rank of assistant supervisor/dispatcher, office, clerical, sales, retail and production staff" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1829-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited at the Cami Plant in the Town of Ingersoll, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1835-93-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Ltd. (Respondent)

Unit: "all employees of Wackenhut of Canada Ltd. at 240 Scarlett Road, 250 Scarlett Road, 260 Scarlett Road and 270 Scarlett Road in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (3 employees in unit) (*Having regard to the agreement of the parties*)

1841-93-R: Laundry and Linen Drivers and Industrial Workers Local 847 (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: "all Security Guards and Parking Lot Attendants employed by Goodwill Industries of Toronto at 234 Adelaide Street East in the Municipality of Metropolitan Toronto, save and except forepersons, those above the rank of foreperson, disabled client - employees on the rolls of the Rehabilitation Division and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

1862-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards of Group 4 C.P.S. Limited at 20 King Street West in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

1872-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Touram Inc. (Respondent)

Unit: "all employees of Touram Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, lead agents, trainers, sales representatives, inventory, office and clerical staff" (116 employees in unit) (*Having regard to the agreement of the parties*)

1913-93-R: Labourers' International Union of North America, Local 1267 (Applicant) v. Moore Packaging Corporation (Respondent)

Unit: "all employees of Moore Packaging Corporation at its Barrie Recycling Services Division at 176A Saunders Road in the City of Barrie, save and except supervisors and persons above the rank of supervisor, office, clerical, sales and technical staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1951-93-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America U.A.W. (Applicant) v. Tatro Equipment Sales Ltd. (Respondent)

Unit: "all employees of Tatro Equipment Sales Ltd. in the City of Chatham, save and except foremen, those above the rank of foreman, clerical and office staff and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

1979-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 55 & 65 Skymark Drive and at 11753 Sheppard Avenue East in the Municipality of Metropolitan Toronto, save and except patrol supervisors and persons above the rank of patrol supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0771-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Metro Cab Company Limited, Yellow Cab Inc., Art's Taxi Limited, PELS Investment Limited, A & A Taxi, ABC Taxi, City

Wide Taxi, Go West Taxi, Northwest Taxi and Don Mills Taxi c.o.b. as "The Metro Cab Group of Companies" (Respondents)

Unit: "all employees of the responding parties operating under the roof sign "Metro Cab" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees" (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	383
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	256
Number of ballots marked against applicant	127
Number of ballots segregated and not counted	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0875-93-R: Bakery, Confectionery and Tobacco Workers International Union Local 264 (Applicant) v. Hamilton Baking Company (1988) Limited (Respondent)

Unit: "all employees of Hamilton Baking Company (1988) Limited in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, clerical, office and store employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons listed as in dispute	40
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	5

0905-93-R: Hospitality & Service Trades Union Local 261 (Applicant) v. Ideal Parking Inc. (Respondent)

Unit: "all employees of Ideal Parking Inc. in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	40
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	16

1265-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Metropolitan Parking Inc. (Respondent)

Unit: "all employees of Metropolitan Parking Inc. regularly employed for not more than 24 hours per week at the Holiday Inn, Crowne Plaza, 225 Front Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3

1325-93-R: Ontario Public Service Employees Union (Applicant) v. Meaford-Beaver Valley Community Support Services (Respondent)

Unit: "all employees of Meaford-Beaver Valley Community Support Services in the Town of Meaford, the

Township of St. Vincent and the Township of Collingwood, save and except House Managers, persons above the rank of House Manager, office staff and persons employed on a government contract basis" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	13

1392-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn, Windsor (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all employees of Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn, Windsor, at its Ramada Inn, Windsor in the City of Windsor, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and sales staff" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5

Applications for Certification Dismissed Without Vote

3309-90-R: Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. MDS Health Group (Homecare Division) (Respondent)

1269-92-R: United Food and Commercial Workers, Local 459 (Applicant) v. Medical Centre Holdings (Leamington Ltd.) (Respondent) v. Group of Employees (Objectors)

0788-93-R: United Steelworkers of America (Applicant) v. Steelwood Doors Co. (Respondent)

1602-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Boless Inc. (Respondent)

1746-93-R: IWA - Canada (Applicant) v. Cashway Building Centres Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0554-92-R: Energy and Chemical Workers Union (Applicant) v. Sandoz Canada Inc. (Respondent)

Unit #1: "all employees of Sandoz Canada Inc. at its Technical Division in the Town of Whitby, save and except forepersons and persons above the rank of forepersons, quality control, laboratory, office and sales staff." (129 employees in unit)

Number of names of persons on revised voters' list	136
Number of persons who cast ballots	128
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	103
Number of ballots segregated and not counted	1

1545-93-R: Independent Paperworkers of Canada (Applicant) v. Domtar Inc. (Respondent) v. Communications, Energy and Paperworkers Union of Canada, C.L.C. and its Local 68 (Intervener)

Unit #1: "all its office employees, performing the jobs listed in the attached appendix A [of the Collective Agreement between the responding party employer and the intervenor], and any jobs added to the bargaining unit during the term of the Collective Agreement, in respect to salaries, hours of employment, and other working conditions covered by this Agreement, save and except: Foremen, Supervisors and persons above this rank; Salesmen, Programmers, Senior Buyers, Engineers, Technical Designers, or persons of relative status; Senior Secretaries, Security Guards, Time Study Men, Janitors, Cleaners, hourly-rated employees covered by Locals 212 and 338; employees in the Domtar Woodlands and Technical Service Department, and persons engaged in a confidential capacity in matters relating to Labour Relations in the Personnel Department." (87 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervenor	50

1561-93-R: Teamsters Local Union 938 (Applicant) v. UL Canada Inc. (Respondent)

Unit #1: "all employees of UL Canada Inc. at its Chesebrough Ponds Division in Markham, save and except supervisors, those above the rank of supervisor, office, clerical, technical, sales staff and security force" (354 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	142
Number of persons who cast ballots	136
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	136
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	77

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1102-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Centra Gas Ontario Inc. (Respondent)

Unit: "all office and clerical employees of Centra Gas Ontario Inc. in the City of Cobourg, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of June 28, 1993" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

1486-93-R: Teamsters Local Union No. 419 (Applicant) v. Stronach & Sons Inc. (Respondent)

Unit: "all employees of Stronach & Sons Inc. in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Front Door Checker, office, clerical and sales staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	6

Applications for Certification Withdrawn

3720-92-R: Teamsters Local Union 938 (Applicant) v. Key-Com Ontario Limited (Respondent)

1233-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Zurek Construction Ltd. (Respondent)

1532-93-R: Service Employees Union, Local 183 (Applicant) v. Transcor Inc. (Respondent)

1589-93-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent)

1628-93-R: Labourers' International Union of North America, Local 1267 (Applicant) v. Laidlaw Transit Ltd. (Respondent)

1707-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

1863-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

1933-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. D & B Enterprises (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3722-92-R: Canadian Union of Public Employees and its Local 2393 (Applicant) v. The Corporation of the Town of Petrolia (Respondent) (*Granted*)

1348-93-R: Canadian Union of Public Employees Local 1605 (Applicant) v. Mohawk Hospital Services (Respondent) (*Granted*)

1466-93-R: Health, Office and Professional Employees Division of Local 175 United Food and Commercial Workers International Union (Applicant) v. The Prince Edward County Board of Education (Respondent) (*Granted*)

1588-93-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent) (*Withdrawn*)

1730-93-R: Ontario Public Service Employees Union (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent) (*Granted*)

1842-93-R: Laundry and Linen Drivers and Industrial Workers Local 847 (Applicant) v. Goodwill Industries of Toronto (Respondent) (*Withdrawn*)

1853-93-R: Anselma House (Applicant) v. London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C., (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

1551-93-FC: Canadian Union of Public Employees Local 3578 (Applicant) v. United Counties of Stormont, Dundas and Glengarry (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2867-92-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Ainsworth Electric Co. Limited and Stadium Corporation of Ontario Limited (Respondents) (*Dismissed*)

3120-92-R: Ontario Pipe Trades Council (Applicant) v. Derksen Mechanical Services Ltd., Derksen Plumbing & Heating Ltd., Derksen Plumbing & Heating (Residential 1984) Ltd. (Respondents) (*Granted*)

3649-92-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461 (Applicant) v. Harry Rosenberg and/or Cineplex Odeon Corporation and/or Niagara Palace Theatres Limited (Respondents) (*Granted*)

0372-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Boen Steel Corp. c.o.b. as Skyline Steel Company, 367108 Ontario Limited c.o.b. as North Steel Erectors Summit Steel Corp. (Respondents) (*Withdrawn*)

0424-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dillon Mechanical Limited; Gall Construction Ltd. operating as Acapulco Recreational Contractors; Con-Gen Limited and 925261 Ontario Limited (Respondents) (*Granted*)

0690-93-R: Labourers' International Union of North America, Local 597 (Applicant) v. Larry Warner Masonry Ltd. and Don Coburn c.o.b. as C W Masonry (Respondents) (*Withdrawn*)

1053-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Consolidated Drywall & Acoustics Limited ("Consolidated") and 945179 Ontario Limited c.o.b. as Centennial Drywall ("Centennial") (Respondents) (*Granted*)

1057-93-R: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Julie A. Reinhardt c.o.b. as Westmount Glass & Mirror, Westmount Storefront Systems Ltd. (Respondents) (*Dismissed*)

1065-93-R: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Bradsil Limited, Bradsil (1967) Limited, Peran Contracting Inc., and Peran Contracting (1987) Inc. (Respondents) (*Dismissed*)

1368-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. San-Mar Plumbing Limited and 954633 Ontario Inc. c.o.b. M & S Plumbing (Respondent) (*Withdrawn*)

1461-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Stroke Masonry and Ace Masonry (987748) Ontario and Labourers' International Union of North America Local #183 (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

1493-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Local 93 (Applicant) v. B.B.S. Construction (Ontario) Limited and Cassidy E.W. Construction Consultant Ltd. (Respondents) v. Roger Hamelin, on his own behalf and on behalf of a group of employees of Cassidy E.W. Construction Consultant Ltd. (Intervener) (*Withdrawn*)

1515-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Associated Mechanical Systems Inc., Associated Mechanical Services Ltd. and/or Larry Burgess c.o.b. as Associated Mechanical Services (Respondents) (*Granted*)

1564-93-R: International Union of Bricklayers and Allied Craftsmen, Local 28, Ontario (Applicant) v. A. Corsi Masonry Ltd. and 1011064 Ontario Ltd. c.o.b. Ancor Masonry (Respondents) (*Withdrawn*)

1867-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenpark Homes and Edgeport Home Corp. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1550-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Borden Boothby and Company Limited; Frontier Construction (Respondents) (*Withdrawn*)

3120-92-R: Ontario Pipe Trades Council (Applicant) v. Derksen Mechanical Services Ltd., Derksen Plumbing & Heating Ltd., Derksen Plumbing & Heating (Residential 1984) Ltd. (Respondents) (*Granted*)

3649-92-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461 (Applicant) v. Harry Rosenberg and/or Cineplex Odeon Corporation and/or Niagara Palace Theatres Limited (Respondents) (*Granted*)

0372-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Boen Steel Corp. c.o.b. as Skyline Steel Company 367108 Ontario Limited c.o.b. as North Steel Erectors Summit Steel Corp. (Respondents) (*Withdrawn*)

0424-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dillon Mechanical Limited; Gall Construction Ltd. operating as Acapulco Recreational Contractors; Con-Gen Limited and 925261 Ontario Limited (Respondents) (*Granted*)

0690-93-R: Labourers' International Union of North America, Local 597 (Applicant) v. Larry Warner Masonry Ltd. and Don Coburn c.o.b. as C W Masonry (Respondents) (*Withdrawn*)

1053-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Consolidated Drywall & Acoustics Limited ("Consolidated") and 945179 Ontario Limited c.o.b. as Centennial Drywall ("Centennial") (Respondents) (*Granted*)

1057-93-R: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Julie A. Reinhardt c.o.b. as Westmount Glass & Mirror, Westmount Storefront Systems Ltd. (Respondents) (*Dismissed*)

1065-93-R: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Bradsil Limited, Bradsil (1967) Limited, Peran Contracting Inc., and Peran Contracting (1987) Inc. (Respondents) (*Dismissed*)

1227-93-R: Communications, Energy and Paperworkers Union of Canada and its Local 1173 (Applicant) v. DRG Stationery and Casson Division of Prestonia Office Products Limited and Anthes Universal Limited (Respondents) v. Graphic Communications International Union, Local N-1 (Intervener) (*Withdrawn*)

1369-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 954633 Ontario Inc. c.o.b. M & S Plumbing (Respondent) (*Withdrawn*)

1461-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Stroke Masonry and Ace Masonry (987748) Ontario and Labourers' International Union of North America Local #183 (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

1493-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Local 93 (Applicant) v. B.B.S. Construction (Ontario) Limited and Cassidy E.W. Construction Consultant Ltd. (Respondents) v.

Roger Hamelin, on his own behalf and on behalf of a group of employees of Cassidy E.W. Construction Consultant Ltd. (Intervener) (*Withdrawn*)

1515-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Associated Mechanical Systems Inc., Associated Mechanical Services Ltd. and/or Larry Burgess c.o.b. as Associated Mechanical Services (Respondents) (*Granted*)

1564-93-R: International Union of Bricklayers and Allied Craftsmen, Local 28, Ontario (Applicant) v. A. Corsi Masonry Ltd. and 1011064 Ontario Ltd. c.o.b. Ancor Masonry (Respondents) (*Withdrawn*)

1867-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenpark Homes and Edgeport Home Corp. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1248-93-R: Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its local affiliates Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582, 915 and 991 (Intervener) (*Granted*)

SECTION 64.2 - SUCCESSION RIGHTS/CONTRACT SERVICES

1236-93-R: Canadian Security Union (Applicant) v. Intertec Security & Investigation Ltd. (Respondents) (*Withdrawn*)

1838-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Yanigue's Janitorial and Maintenance Services (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0994-93-R: David Wood (Applicant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC and its Local 414 (Respondent) v. Peacock Lumber Limited (Intervener) (*Granted*)

Unit: "all employees of Peacock Lumber Limited in the City of Oshawa, save and except supervisors and those employees above the rank of supervisor, office and clerical staff, sales staff, students employed during the school vacation period and persons employed for less than 24 hours per week" (12 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	10

1246-93-R: John Walsh (Applicant) v. IWA - Canada (Respondent) v. Forestply Industries Inc. (Intervener) (*Terminated*)

1330-93-R: Richard Martin (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) v. Association of Part-Time Undergraduate Students (Intervener) (*Granted*)

Unit: "all employees of the Association of Part-Time Undergraduate Students of the University of Toronto, save and except Executive Director and persons above the rank of Executive Director" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

1409-93-R: The Employees of Grange W. Elliott Ltd. (Applicant) v. Labourers' International Union of North America Local 247 (Respondent) v. Grange W. Elliott Ltd. (Intervener) (*Dismissed*)

Unit: "all employees engaged as surveyors in the employ of Grange W. Elliott Ltd. in Ontario Labour Relations Board Area numbers 12, 29 and 30 in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1596-93-R: Peggy H. Delaney (Applicant) v. United Steelworkers of America (Respondent) v. Gallup Canada (Intervener) (*Dismissed*)

1710-93-R: Mr. Scott D. Mason (Applicant) v. United Steelworkers of America (Respondent) v. Cornwall Community Credit Union Limited (Intervener) (*Granted*)

1749-93-R: Ken Murray (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 887 (Respondent) v. Moore Business Forms and Systems Ltd. (Intervener) (*Withdrawn*)

Unit: "all employees of Moore Business Forms and Systems Ltd. in the City of Trenton, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons employed on a co-operative training program with a recognized college or university" (152 employees in unit)

1974-93-R: Barun Kumar Roy and Melvin Cragg (Applicant) v. United Steelworkers of America Local 16506 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1743-93-U: Premier Pipelines Inc. and Murphy Contracting Inc. (a Joint Venture) (Applicant) v. Juri Mertson, et al, and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 628 (Respondents) (*Withdrawn*)

2024-93-U: Ellis-Don Construction Limited (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0462-92-U: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ellerby General Contractors (Respondent) (*Withdrawn*)

0810-92-U: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Marc Mechanical Limited (Respondent) (*Withdrawn*)

1433-92-U: United Steelworkers of America (Applicant) v. Exacta Precision Products Limited (Respondent) (*Withdrawn*)

1888-92-U: United Steelworkers of America (Applicant) v. Dan Courville Chevrolet Geo Oldsmobile Ltd. (Respondent) (*Terminated*)

2313-92-U: Guylaine Poissant (Applicant) v. Association Des Professeurs De L'université De Hearst (Respondent) (*Withdrawn*)

3506-92-U: Canadian Union of Public Employees Local 1605 (Applicant) v. Mohawk Hospital Services Inc. (Respondent) (*Dismissed*)

3760-92-U: Michael A. Ross (Applicant) v. Arthur A. Adams on his own behalf and on behalf of the Labourers International Union of North America, Local 493 (Respondent) (*Dismissed*)

3790-92-U: Erwin Fisher (Applicant) v. Blue Line Taxi Co. Ltd. and Joseph Kramer (Respondent) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC (Intervener) (*Dismissed*)

0189-93-U: Randal Hachey (Applicant) v. Slater Steel (Hamilton Specialty Bar Division), United Steelworkers of America Local 4752 (Respondents) (*Dismissed*)

0264-93-U: Ray Major (Applicant) v. The American Federation of Grain Millers, Local 242 (Respondent) (*Withdrawn*)

0325-93-U: Jean-Guy Levesque (Applicant) v. Canadian Union of Public Employees Local 896 (Respondent) (*Withdrawn*)

0447-93-U: Carlo Alberto Divencenzo (Applicant) v. United Steelworkers of America Local 3997 (Respondent) v. National Magnet Wire Inc. (Intervener) (*Withdrawn*)

0467-93-U: James Michael Ellard (Applicant) v. Toronto Typographical Union (Respondent) v. Multipak Ltd. (Intervener) (*Dismissed*)

0555-93-U: Shariar Namvar and Malik Awada (Applicants) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC and Blue Line Taxi Company Ltd. (Respondents) (*Dismissed*)

0648-93-U: Office and Professional Employees' International Union, Local 343 (Applicant) v. Avestel Credit Union Limited (Respondent) (*Withdrawn*)

0962-93-U: Aaron G. Hume (Applicant) v. Canadian Union of Public Employees, Local 3501 (Respondent) v. The Boy's Home (Intervener) (*Withdrawn*)

1008-93-U: Ray Major (Applicant) v. The American Federation of Grain Millers, Local 242, McCormick's Limited and Culinar Foods Inc. (Respondents) (*Withdrawn*)

1015-93-U: Ken Brown (Applicant) v. Canadian Union of Public Employees - CLC Ontario Hydro Employees' Union Local 1000 (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

1171-93-U: Odilia De Fátima Coelho (Applicant) v. C.U.P.E. Local #2295 (Respondent) (*Withdrawn*)

1317-93-U: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cardwell Laundry Limited, Aquatec Laundry Systems Inc. and Yale, Kline, Levitsky, Feldman Inc., Trustee in Bankruptcy (Respondents) (*Withdrawn*)

1404-93-U: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington County General Hospital (Respondent) (*Withdrawn*)

1437-93-U; 1438-93-U: Mark S. Walden (Applicant) v. Cabletech (Respondent); Mark S. Walden (Applicant) v. C.A.W. (Respondent) v. John McLarty (Intervener) (*Terminated*)

1457-93-U: Retail, Wholesale and Department Store Union Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. U-Need-A-Cab Limited (Respondent) (*Withdrawn*)

1471-93-U: Donald James Seegmiller (Applicant) v. Labourers' International Union of North America Local 597 (Respondent) (*Withdrawn*)

1496-93-U: Canadian Union of Public Employees (Applicant) v. Carleton University Students' Association Inc. (Respondent) (*Granted*)

1508-93-U: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Don Truax Sheet Metal Ltd. (Respondent) (*Granted*)

1511-93-U: Colleen McKee (Applicant) v. Peel Memorial Hospital (Respondent) v. Service Employees' International Union Local 204 (Intervener) (*Withdrawn*)

1516-93-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Associated Mechanical Systems Inc., Associated Mechanical Services Ltd. and/or Larry Burgess c.o.b. as Associated Mechanical Services (Respondents) (*Withdrawn*)

1544-93-U: United Food & Commercial Workers Union, Local 1977 (Applicant) v. Loeb Club Plus - Walker Place (Respondent) (*Dismissed*)

1558-93-U: Brenda Burgess (Applicant) v. City of North Bay, CUPE Local 122 (Respondents) (*Withdrawn*)

1566-93-U: The Canadian Union of Base Metal Workers (CSN) and Mr. Bruce Fraser (Applicant) v. Noranda Minerals Inc., Geco Division (Respondent) (*Withdrawn*)

1606-93-U: David A. Scott (Applicant) v. OPSEU (Ontario Public Service Employees Union) Local 666, Network North (Sudbury Algoma Hospital) (Respondents) (*Withdrawn*)

1619-93-U: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Torino Drywall Systems (Respondent) (*Granted*)

1650-93-U: James A. Kainz (Applicant) v. Windsor Local of Energy and Chemical Workers Union, and B.A.S.F. Coatings and Inks, Ltd. (Respondents) (*Withdrawn*)

1651-93-U: Darren Gillespie (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 284, Shaw Baking Company Limited (Respondents) (*Withdrawn*)

1662-93-U: Larry Cohen (Applicant) v. York University Staff Association/York University (Respondents) (*Withdrawn*)

1667-93-U: Hospitality & Service Trades Union Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

1713-93-U: IWA - Canada (Applicant) v. Goulard Lumber (1971) Ltd. (Respondent) (*Withdrawn*)

1727-93-U: United Food and Commercial Workers Local 175 (Applicant) v. Rowanwood Retirement Lodge (Respondent) (*Withdrawn*)

1737-93-U: Retail, Wholesale and Department Store Union A.F.L. - C.I.O. - C.L.C. (Applicant) v. Sudbury Laundry and Dry Cleaners Ltd. (Respondent) (*Dismissed*)

1738-93-U: Retail, Wholesale and Department Store Union A.F.L. - C.I.O. - C.L.C. (Applicant) v. Northern Uniform Services Corp. (Respondent) (*Dismissed*)

1742-93-U: "Employees" Toe Closing department Vagden Mills (Applicant) v. Amalgamated Clothing and Textile Workers Union Local 1764 (Respondent) (*Withdrawn*)

1751-93-U: Pauline Wright (Schneider) (Applicant) v. Northern Ontario Joint Council of the Retail Wholesale and Department Store Union (Respondent) (*Dismissed*)

1760-93-U: Margaret Brouse (Applicant) v. Civic Institute of Professional Personnel (Respondent) (*Withdrawn*)

1769-93-U: Canadian Union of Public Employees Local 3679 (Applicant) v. Unemployed Help Centre (Respondent) (*Withdrawn*)

1775-93-U: Christine Casey-Parkinson (Applicant) v. Celanese Canada Inc. (Respondent) (*Dismissed*)

1812-93-U: Canadian Union of Public Employees and its Local 2276 (Applicant) v. Port Colborne District Association for Community Living (Respondent) (*Withdrawn*)

1825-93-U: Richard Pellerin (Applicant) v. Wilfred McIntyre, and Claude Sequin acting on their own behalf, and on behalf of the IWA-Canada, Local 2693 (Respondent) v. E.B. Eddy Forest Products Ltd. (Intervener) (*Withdrawn*)

1834-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Andromeda Publications Limited (Respondent) (*Dismissed*)

1852-93-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847, Affiliated with the International Brotherhood of Teamsters, AFL-CIO (Applicant) v. The Salvation Army Toronto Addictions and Rehabilitation Centre, Industrial Services (Respondent) (*Withdrawn*)

1953-93-U: United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Tatro Equipment Sales Ltd. (Respondent) (*Withdrawn*)

1965-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Kuester Magna Cable Controls Inc., a division of Atoma International Inc. (Respondent) (*Withdrawn*)

2030-93-U: IWA Canada (Applicant) v. Isadore Roy Lumber Limited (Respondent) (*Withdrawn*)

2112-93-U: Frank Fusco (Applicant) v. Labourers' International Union of North America (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1665-93-M: Retail, Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited and Retail Wholesale and Department Store Union, AFL-CIO-CLC (Respondent) (*Granted*)

1712-93-M: IWA Canada (Applicant) v. Goulard Lumber (1971) Ltd. (Respondent) (*Withdrawn*)

1723-93-M: United Food and Commercial Workers Local 175 (Applicant) v. Rowanwood Retirement Lodge (Respondent) (*Withdrawn*)

2029-93-M: IWA Canada (Applicant) v. Isadore Roy Lumber Limited (Respondent) (*Withdrawn*)

2042-93-M: IWA Canada, Local 2693 (Applicant) v. Hood Logging Equipment Canada Incorporated (Respondent) (*Withdrawn*)

2061-93-M: United Steelworkers of America (Applicant) v. Shelter Canadian Properties Limited (Respondent) (*Granted*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1967-93-M: Bruce Henry (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Asea Brown Boveri Inc. (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1594-93-M: Cleanwear Uniform Service Inc. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

1739-93-M: Canadian Motor Hotel (Applicant) v. Retail, Wholesale and Department Store Union, Local 582 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2095-92-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089 (Applicants) v. International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 and Electrical Power Systems Construction Association and Bermingham Construction Limited (Respondents) (*Granted*)

1753-93-JD: Communications, Energy & Paperworkers' Union Local 39 (Applicant) v. Communications, Energy & Paperworkers' Union Local 257, and Canadian Pacific Forest Products Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

4074-91-M: Wellington County Roman Catholic Separate School Board (Applicant) v. Wellington Separate Support Staff Association (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0175-92-OH: Ruy F. Barros (Applicant) v. T. Eaton Company (Respondent) (*Withdrawn*)

1034-93-OH: Edward McGimpsey (Applicant) v. Guelph Transportation Commission (Respondent) (*Dismissed*)

1239-93-OH: Marty O'Shaughnessy (Applicant) v. Corporation of the City of Cornwall (Cornwall Transit) (Respondent) (*Withdrawn*)

1316-93-OH: Ralph Molinari (Applicant) v. Cardwell Laundry Limited, Aquatech Laundry Systems Inc., Yale, Kline, Levitsky, Feldman Inc., Trustee in Bankruptcy (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

1800-93-EP: William J. Viveen (Applicant) v. Vanden Bussche Irrigation Equipment Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2714-92-G: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kopic Wrecking (Respondents) (*Granted*)

0689-93-G: Labourers' International Union of North America, Local 597 (Applicant) v. Larry Warner Masonry Ltd. (Respondent) (*Withdrawn*)

1052-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Consolidated Drywall & Acoustics Limited ("Consolidated") and 945179 Ontario Limited c.o.b. as Centennial Drywall ("Centennial") (Respondents) (*Granted*)

1056-93-G: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Julie A. Reinhardt c.o.b. as Westmount Glass & Mirror, Westmount Storefront Systems Ltd. (Respondents) (*Granted*)

1064-93-G: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Bradsil Limited, Bradsil (1967) Limited, Peran Contracting Inc. and Peran Contracting (1987) Inc. (Respondents) (*Granted*)

1160-93-G: International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. Haelzle Masonry Ltd. (Respondent) (*Granted*)

1218-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. A & A Rebar Placers Ltd. (Respondent) (*Granted*)

1328-93-G; 1601-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Don Truax Sheet Metal Ltd. (Respondent) (*Granted*)

1403-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Hyten Mechanical (1985) Ltd. (Respondent) (*Granted*)

1470-93-G: Labourers' International Union of North America Local 837 (Applicant) v. Kopic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kopic Wrecking (Respondents) (*Granted*)

1492-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Local 93 (Applicant) v. Cassidy E.W. Construction (Ontario) (Respondent) (*Withdrawn*)

1526-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. H.G. Susgin Construction Ltd. (Respondent) (*Withdrawn*)

1565-93-G: International Union of Bricklayers and Allied Craftsmen, Local 28, Ontario (Applicant) v. A. Corsi Masonry Ltd. and 1011064 Ontario Ltd. c.o.b. Ancor Masonry (Respondents) (*Withdrawn*)

1620-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Torino Drywall Systems (Respondent) (*Terminated*)

1633-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. G. & N. Contracting (Respondent) (*Withdrawn*)

1668-93-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. B B S Construction Ltd. (Respondent) (*Withdrawn*)

1677-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. J. R. Mechanical Inc. (Respondent) (*Granted*)

- 1695-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. 668463 Ontario Inc. o/a Advance Excavating (Respondent) (*Granted*)
- 1696-93-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Astro Sheet Metal (Respondent) (*Withdrawn*)
- 1714-93-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. L-K Interior Contracting Inc. (Respondent) (*Withdrawn*)
- 1715-93-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Skeates Contracting Inc. (Respondent) (*Withdrawn*)
- 1716-93-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Skeates Contracting Inc. (Respondent) (*Withdrawn*)
- 1717-93-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Shandon Associates Ltd. (Respondent) (*Withdrawn*)
- 1724-93-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Douglas Flooring Ltd. (Respondent) (*Withdrawn*)
- 1725-93-G:** United Brotherhood of Carpenters & Joiners of America Local 785 (Applicant) v. Besa Interiors Limited (Respondent) (*Granted*)
- 1734-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Fernview Construction Limited (Respondent) (*Withdrawn*)
- 1735-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Starview Contracting Inc. (Respondent) (*Granted*)
- 1748-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Machinery Movers Limited (Respondent) (*Granted*)
- 1756-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Scaffold Solutions Ltd. (Respondent) (*Withdrawn*)
- 1757-93-G:** United Brotherhood of Carpenters and Joiners of America, Locals 1946 and 1316 (Applicant) v. Group 4 Building Systems Inc. (Respondent) (*Granted*)
- 1770-93-G:** International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. Reinhardt Masonry Limited (Respondent) (*Granted*)
- 1771-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)
- 1772-93-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrazzo Mosaic & Tile Company Limited (Respondent) (*Endorsed Settlement*)
- 1773-93-G:** International Association of Bridge, Structural and Ornamental Iron Workers Local 786 (Applicant) v. City Welding (Sudbury) Limited (Respondent) (*Withdrawn*)
- 1781-93-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Main Mechanical Ltd. (Respondent) (*Granted*)
- 1790-93-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. 689269 Ontario Ltd., Gencon Arena & Athletic Systems, Gencon Builders (Respondents) (*Withdrawn*)

1810-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dome Carpets Limited (Respondent) (*Withdrawn*)

1818-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Ltd. (Respondent) (*Withdrawn*)

1856-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. 736257 Ontario Limited c.o.b. as Majesty Contracting (Respondent) (*Granted*)

1868-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. LTL Contracting Ltd. (Respondent) (*Withdrawn*)

1874-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Rotex Electric Contractors Ltd. (Respondent) (*Withdrawn*)

1875-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Tesla Electric Construction Ltd. (Respondent) (*Withdrawn*)

1876-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Tripas Limited (Respondent) (*Withdrawn*)

1878-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. MacNaughton Electric (Respondent) (*Granted*)

1879-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Myles Services Company Ltd. (Respondent) (*Withdrawn*)

1880-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Walcom Inc. (Respondent) (*Withdrawn*)

1882-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Plaza Electric (Respondent) (*Granted*)

1884-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Etobicoke Electrical Contrs. (Respondent) (*Withdrawn*)

1885-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Richmer Electric Ltd. (Respondent) (*Withdrawn*)

1888-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canyon Electric Co. (Respondent) (*Withdrawn*)

1889-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Thomas & Banlaki (Respondent) (*Withdrawn*)

1891-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Blackhawk Electrical (Respondent) (*Withdrawn*)

1893-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Don Valley Electric (919937 Ontario Limited) (Respondent) (*Withdrawn*)

1897-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Vale Electric Inc. (Respondent) (*Withdrawn*)

1898-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lynx Cabling Systems Limited (Respondent) (*Withdrawn*)

1912-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sherway Contracting Ltd. (Respondent) (*Granted*)

1930-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Limited (Respondent) (*Withdrawn*)

1939-93-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Xtra Mechanical Limited (Respondent) (*Withdrawn*)

1940-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Concept Systems Electric (Respondent) (*Granted*)

1963-93-G; 1964-93-G: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Marian Shabone c.o.b. as Pro-Tech Sandblasting & Painting (Respondent) (Endorsed Settlement)

1971-93-G: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

1983-93-G: Lake Ontario District Council United Brotherhood of Carpenters and Joiners of America (Applicant) v. Suburban Plastering and Drywall Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3703-91-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Inc. and Louis Trindade (Respondents) (*Dismissed*)

1431-92-U: Steven Sheppard (Applicant) v. U.A. Local 463 (Respondent) (*Dismissed*)

2736-92-U: Tom Vrantis (Applicant) v. Employees Association of Naylor Group Incorporated and Naylor Group Incorporated (Respondents) (*Dismissed*)

3103-92-U: Lloyd W. MacLean (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Respondent) v. Ontario Hydro, The Electrical Power Systems Construction Association (Intervenors) (*Dismissed*)

0423-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Granite Club, Limited (Respondent) v. International Beverage Dispensers' and Bartenders' Union, Local 280 (Interested Party) (*Dismissed*)

1083-93-U: Leo M. Labatt (Applicant) v. Employee of Sunnybrook Health Science Centre (Respondent) (*Dismissed*)

1123-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

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ONTARIO LABOUR RELATIONS BOARD REPORTS

November 1993



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1993] OLRB REP. NOVEMBER

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



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ELLIS-DON LIMITED, THE JACKSON-LEWIS COMPANY LIMITED AND EASTERN CONSTRUCTION COMPANY LIMITED; RE CJA, LOCAL 27, AND LIUNA, LOCAL 183

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- METROPOL SECURITY SERVICES, BARNES SECURITY SERVICES LIMITED
C.O.B. AS; RE USWA 1154
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Metal Workers' union moving to strike affidavit filed by Carpenters' union in judicial review application - Divisional Court dismissing motion to strike affidavit

VIC WEST STEEL, CJA, LOCAL 1256; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SMW, LOCAL 539; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP

1243

1700-93-U; 1701-93-M Associated Contracting Inc., Applicant v. Michael Gallagher and International Union of Operating Engineers, Local 793, Responding Parties

Abandonment - Bargaining Rights - Conciliation - Construction Industry - Evidence - Picketing - Strike - Employer asserting that threatened strike unlawful on ground that union had previously abandoned bargaining rights -Threatened strike following timely "notice to bargain", appointment of conciliation officer and issuance of 'no board' report - Board declining to inquire into continued existence of bargaining rights in circumstances of this case - Board also not accepting employer's assertion that threatened picketing by union improperly motivated and, therefore, unlawful - Application dismissed

BEFORE: *Jules Bloch*, Vice-Chair.

DECISION OF THE BOARD; November 2, 1993

1. This is an application under section 137 of the *Labour Relations Act* ("the Act") and a related request for interim relief under section 92.1. The applicant, Associated Contracting Inc. ("the Employer" or "Associated") asserts, among other things, that officials of the respondent International Union of Operating Engineers, Local 793 ("the Union" or "Local 793") have threatened to encourage an unlawful strike and or picket at sites of Associated pursuant to what it described as an invalid "No Board Report", contrary to section 76 and 78 of the Act. Further, assuming that there is a valid "No Board Report", it is alleged that the union is picketing the Associated sites for an unlawful purpose and that the picketing is, therefore, unlawful. In its application under section 137, the employer seeks the following:

- (a) A declaration that Local 793 abandoned its bargaining rights/collective agreement in relation to Associated Contracting.
- (b) A declaration that the Appointment Of A Conciliation Officer and the subsequent issuance of a "No Board Report" by the Minister were without authority and of no effect.
- (c) A declaration that M. Gallagher and the IUOE, Local 793 violated the *Labour Relations Act* as alleged in this Appendix 2.
- (d) An order that M. Gallagher and the IUOE, Local 793 cease and desist from violating the *Labour Relations Act* in relation to any of the Responding Parties in OLRB File No. 2283-92-R.
- (e) An order that no proceedings involving any of the Responding Parties in OLRB File No. 2283-92-R may be instituted by IUOE, Local 793, except with leave of the Board.
- (f) Such further or other relief as the Board may consider to be appropriate.

2. These matters were expedited by Vice-Chair Sherry Liang in a decision dated September 2, 1993 and a hearing was scheduled on September 3, 1993. At the commencement of the proceedings on September 3, the Board was asked to deal with two preliminary matters. The Board delivered several oral rulings in respect of the preliminary matters.

3. These are the Board's written reasons in respect of the preliminary matters. These reasons expand upon the oral rulings which issued during the course of the proceedings.

4. The Board was asked by the parties to decide whether Associated should be permitted to lead evidence to show that Local 793 had abandoned bargaining rights. The second matter involved a determination by the Board in respect of Local 793's reliance on the "No Board Report" for an allegedly unlawful purpose.

5. Most of the facts in this matter are not in dispute and can be succinctly summarised. Associated voluntarily recognized and signed a collective agreement with Local 793 on August 31, 1990. That collective agreement, which was filed with the Board, had an expiry date of April 30, 1992. It is the contention of Associated that during the currency of the collective agreement it did not abide by the terms and conditions of that collective agreement and that it operated in the construction industry as a non-union contractor with the express knowledge and acquiescence of Local 793. Local 793 denies these allegations. It is sufficient for our purposes that Associated was prepared to produce evidence in support of its assertion that Local 793 had abandoned its bargaining rights.

6. On February 6, 1992 (that is, within the period of ninety days before the agreement would cease to operate), Local 793 sent Associated "notice to bargain" a renewal collective agreement between the parties. On October 30, 1992, Local 793 filed its Request For Appointment of A Conciliation Officer with the Ministry of Labour. There was extensive correspondence between the Minister of Labour's office, Associated, and Local 793 with respect to this matter. Specifically, Associated objected to the appointment of a Conciliation Officer on the grounds that Local 793 had abandoned its bargaining rights. In a letter dated November 10, 1992 addressed to the Assistant Deputy Minister of Labour, counsel for Associated asserted that the employer had indicated its willingness to meet with the union after it received the February 6 "notice to bargain". Counsel advised the Ministry that:

"Despite this willingness, the union took no steps to arrange such a meeting at that date or any subsequent date up to and including today's date [November 10, 1992]"

Counsel for the Union, in a letter to the Ministry dated December 7, 1992, denied the employer's assertion and indicated that it had "sought to bargain with representatives of the employer by requesting meetings at various times over the last several months". It is interesting to note that at one point in this chain of events both Associated and Local 793 requested that, pursuant to section 109 of the Act, a ministerial reference be made to the Board to determine the status of the trade union's bargaining rights. On June 21, 1993, the Minister advised the parties that it would not be referring this matter to the Board and a conciliation officer was subsequently appointed. The Minister, as evidenced by the correspondence, took the position that it is within the jurisdiction of the Board to make determinations about bargaining rights. In its letter dated June 21, 1993, the Ministry noted that, although the employer asserted as early as November 1992 that the union had abandoned its bargaining rights "there had been no declaration from the Ontario Labour Relations Board that the union no longer represents the employees in the bargaining unit". On August 10, 1993 the Minister issued a "No Board Report".

7. On November 5, 1992, Local 793 and the Labourers International Union of North America, Local 183 filed separate applications for certification in respect of employees of Associated and various other related companies (the "Capobianco Companies"). In the reply to the certification application, the respondents (including Associated) acknowledged the followings facts:

a) Associated Contracting Inc. and Capo Contracting Inc. are the only corporations (of the responding parties) employing construction industry field personnel.

b) Associated Contracting Inc. and Capo Contracting Inc. are associated or related businesses or activities under common direction and control within the meaning of section 1(4) of the Act.

8. As a result of the applications for certification, Associated has, to date, attended at 14 days of Labour Relations Officer examinations. As well, there are at least two outstanding grievances in respect of Associated. Local 793's position with respect to these matters is best summed up by a December 23, 1992 letter from its counsel to the Registrar of the Board. The letter is reproduced below:

In connection with the above-captioned proceedings we wish to confirm the following:

(i) I.U.O.E. Local 793 currently holds bargaining rights pursuant to a voluntary collective agreement signed in the name of Associated Contracting Inc. which expired April 30, 1992;

(ii) I.U.O.E. Local 793 served timely notice to bargain by registered letter dated February 6, 1992 activating a Section 81 freeze period for all terms and conditions of employment under the collective agreement;

(iii) The most recent reports received from Associated Contracting Inc. forwarded to the I.U.O.E. Local 793 Trust Funds by President T. Capobianco are "nil reports" indicating that the business was inactive;

(iv) However, construction activity by the Respondent Corporations was observed by I.U.O.E. Local 793 which initiated its organizing drive leading to this Application for Certification filed on November 5, 1992;

(v) The Reply filed by the Respondent Corporations acknowledged the following facts:

(a) Associated Contracting Inc. and Capo Contracting Inc. are the only Respondent Corporations employing construction industry field personnel; and

(b) Associated Contracting Inc. and Capo Contracting Inc. are associated or related businesses or activities under common direction or control within the meaning of Section 1(4) of the Act.

(vi) I.U.O.E. Local 793 made an Application for the Appointment of a Conciliation Officer on October 30, 1992.

(vii) I.U.O.E. Local 793 filed a grievance dated November 12, 1992 against Associated Contracting Inc. which is presently being referred to the Ontario Labour Relations Board pursuant to Section 126.

Accordingly, it is the position of I.U.O.E. Local 793 that it already holds bargaining rights for its craft for the entirety of the "Associated Paving" enterprise consisting of the Respondent Corporations. Further I.U.O.E. Local 793 will pursue its bargaining rights and violations of the operative collective agreement.

I.U.O.E. Local 793 will also pursue a formal declaration that the Respondent Corporations are associated or related businesses or activities under common direction or control within the "Associated Paving" enterprise pursuant to Section 1(4) of the Act and are bound to the collective agreement and the bargaining rights thereunder.

Finally, in the alternative, I.U.O.E. Local 793 relies on this Application for Certification as against all Respondents pursuant to Section 1(4) to confirm and/or establish bargaining rights

for its craft.

Yours truly,

KOSKIE AND MINSKY

(SIGNED)

for: Stephen Wahl

9. Associated takes the position that this letter is evidence of the inconsistent nature of Local 793's positions. Counsel submits that, having elected to proceed with its application for certification against all of the Capobianco Companies, including Associated, Local 793 should not be permitted to pursue its rights through the conciliation process in the alternative. In the above-noted application for certification, the only mention of previously existing bargaining rights is found at paragraph 10 (x). The applicant states:

(x) Contracting (associated) and the Applicant were bound by a collective agreement which expired on April 30, 1992. Contracting has ceased to observe the provisions of this collective agreement.

10. Associated's counsel submits that the application for certification is in relation to the same employees who have continued to work for Associated at the sites of the threatened picketing. Further, the application for certification involves a petition, which may be affected by the various positions of Local 793 before this Vice-Chair.

11. Counsel for 793 submits that the Minister of Labour and the Board have a shared jurisdiction under the *Act*. The appointment of Conciliation Officers and the release of "No Board Reports" are within the exclusive jurisdiction of the Minister. So long as the statutory preconditions are met, the Minister, subject to a reference to the Board pursuant to section 109, must appoint a conciliation officer, and, subsequently, upon request, issue a "No Board Report".

12. The relevant sections of the *Act* are set out below:

16.-(1) Where notice has been given under section 14 or 54, the Minister, upon the request of either Party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

19. If the conciliation officer is unable to effect a collective agreement within the time allowed under section 18,

• • •

19. (b) the Minister shall forthwith by notice in writing inform each of the parties that he or she does not consider it advisable to appoint a conciliation board.

74. (2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

• • •...

74. (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

78 (1) No person shall do any act if the person knows or ought to know that, as a probable and

reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

108-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

109.-(1) The Minister may refer to the Board any question which in his or her opinion relates to the exercise of his or her powers under this Act and the Board shall report its decision on the question.

13. Local 793 asserts that the Board has no role in giving unsolicited advisory opinions in respect of matters within the exclusive jurisdiction of the Minister. In this respect Counsel for Local 793 argues that there is a distinction between matters referred to the Board on original invocation of its jurisdiction and matters that are subordinately referred where original jurisdiction rests in another authority. (see: *Regina v. Ontario Labour Relation Board, Ex parte Kitchener Food Market Ltd.* [1966] 2 O.R. 513 at p.522) In this case the Minister specifically declined to refer the question to the Board and, consequently, the Board should not do through the back door what it was not asked to do through the front door. It is clear law that even if the Minister should ask for the Board's opinion, the Minister is not bound by that opinion.

14. Counsel relies on *McLeod & Sons* [1972] O.L.R.B. Rep. Jan. 102 as determinative of this issue. The case involves an attempted raid by the Christian Labour Association of Canada ("C.L.A.C.") in respect of a bargaining unit represented by the International Brotherhood of Painters and Allied Trades, Local Union 1824. This "raid" was commenced by C.L.A.C. after the appointment of a conciliation officer. This appointment closed the so-called "open period". C.L.A.C. wanted to introduce evidence before the Board to establish that the predecessor trade union never had bargaining rights in respect of the employees of McLeod & Sons. The Board would not entertain this evidence and found the application for certification untimely.

15. Associated's Counsel submits that the issue of abandonment is an issue of fact and law. Section 108 (1) grants the Board exclusive jurisdiction to determine all questions of fact or law that arise in any matter before it. The issue of abandonment arises collaterally in considering whether the picketing is unlawful. Counsel argues that a finding of abandonment would not technically affect the "No Board Report", as only the Minister can, with a stroke of *his/her* pen, make it null and void. Counsel relies on *Gravel and Lake Services Limited* [1990] OLRB Rep. March 262 for this proposition. This case involved a "final offer vote" pursuant to section 40 of the *Act* and whether the Board was the proper forum to adjudicate matters in relation to voter eligibility. The Board held that the Minister has no authority to adjudicate or determine disputes in which breaches of the *Act* are alleged. Further Counsel asserts that although the Minister specifically declined to ask the Board's opinion in this matter pursuant to section 109, the Board can make a determination in respect of abandonment in this case. In doing so, counsel submits, the Board is not making an advisory opinion but, rather, a ruling in respect of bargaining rights.

16. The Board has jurisdiction to consider whether bargaining rights exist or have been abandoned in the context of a section 137 application. However the Board has no jurisdiction to set aside a "No Board Report" or to declare that a "No Board Report" issued by the Minister is of no effect or a "nullity", as requested by the employer in this case. The Minister's authority under

the *Act* to appoint Conciliation Officers and to issue “No Board Reports” is exclusive. The Board’s decision in *Gravel and Lake Services Limited*, (supra), does not assist the employer’s argument in this matter. The Board in *Gravel and Lake Services Limited*, (supra) did not in any way affect the ordering of a section 40 final offer vote, which was within the exclusive jurisdiction of the Minister of Labour. Once the Minister ordered the vote, the Board in reviewing the eligibility of the voters, or the conduct of the vote, was performing functions which were in aid of, and consistent with, the Minister’s original determination. We find that *Gravel and Lake Services Limited*, (supra) is clearly distinguishable from the case at hand. The employer asserted before the Minister in November 1992 that the union had abandoned its bargaining rights on the grounds of alleged inactivity and an alleged failure to attempt to negotiate a renewed collective agreement. However, at no time prior to November 1992, nor in the ten months following, did the employer seek a declaration from the Board that the union no longer represents its employees. The employer, for reasons known only to it, has never chosen to seek such a declaration from the Board. Associated, prior to the granting of the “No Board Report” could have sought, pursuant to section 60 of the *Act* a declaration that the union no longer represents the employees in the bargaining unit. Instead, it has sought to raise the issue with the Board only after the issuance of a “No Board Report” and do so only collaterally in the context of a section 137 application. In all these circumstances, and having particular regard to the sequence of events and the timing of this application, the Board was not inclined to inquire into the continued existence of bargaining rights in this case.

17. In respect of the second matter, Counsel for Associated asserts that Local 793 is relying on the “No Board Report” for an unlawful purpose. It is alleged the the picketing was designed to force Associated and the rest of the Capobianco family to sign collective agreements. This pressure during a certification proceeding, it is said, is tantamount to a recognition strike.

18. Associated’s counsel submits that Local 793 has taken many fresh steps in respect of a multiplicity of proceedings which are on their face inconsistent. An example of this is Local 793 placing on the list of employees in the certification application the very same employees it will prevent from working during a strike. How, it asks, can workers who are properly on the list of employees in respect of a certification application also be the same employees affected by a lawful strike? As well, Local 793 is also asserting bargaining rights in at least two grievances presently before the Board. How, it asks, can the Board entertain grievances in relation to a company that is in the process of being organized? An unorganized company does not have collective agreements.

19. Associated’s counsel relies on the improper purpose doctrine as discussed at paragraphs 26 through to 30 in *Bay-Tower Homes Company Ltd.* [1988] OLRB Rep March 259. That case involved another in a long series of skirmishes between Local 27, United Brotherhood of Carpenters and Joiners of America and Local 183, Labourers’ International Union of North America. In particular, Local 183 was using its “No Board Report” with respect to one company to force other related companies to sign collective agreements. The Board held that Local 183’s picketing was not aimed predominantly at exerting pressure on the primary employer in respect of a labour dispute with that employer. In support of this theory counsel relies by analogy on *Horton CBI, Limited*. [1985] OLRB Rep. June 880, a case where the Board found that picketing in support of jurisdictional claims would as a probable and reasonable consequence, induce persons to engage in an unlawful strike. The Board in that case found that the Ironworkers’ union was using the picket line to circumvent other sections of the *Act*. (For a similar analysis see *Traugott Construction Limited*, [1981] OLRB Rep. Nov. 1680; *Traugott Construction Limited*, [1982] OLRB Rep. June 958; upheld on judicial review at 84 CLLC 12,098.)

20. Counsel for Associated submits that Local 793 should not be allowed to resile from the position it took in the certification application. By agreeing that employees of Associated are prop-

erly on the employers' list of employees, Local 793 is asserting that it does not have bargaining rights. In *Construction 2000* [1988] OLRB Rep. Oct. 1017 the Board held that the Labourers union abandoned its bargaining rights for carpenters when it withdrew its intervention. It was not open to the Labourers union to refuse to defend bargaining rights, which it claimed to hold, where the existence of those rights had been placed directly in issue and still purport to retain them for some other purpose.

21. Counsel for Associated argued that the Board must conclude that the purpose of picketing during certification proceedings was to effect voluntary recognition of the union by Associated and other members of the Capobianco family.

22. Counsel for 793 asserted that Associated wanted a total ban on picketing. Such a ban would totally conflict with the statutory rights flowing from "No Board Report". He further commented that the Board can not order a total ban on picketing as such a ban would nullify the "No Board Report" and that is not within the Board's jurisdiction.

23. In the alternative, submitted Counsel, Local 793 has done nothing unlawful. All actions taken are properly sanctioned by the *Act*. A party is entitled to take a multiplicity of steps to properly protect itself in respect of a very complex matter. The Board in *Bay-Tower Homes* (supra) found that Local 183's predominant purpose was to pressure the four picketed employers to sign agreements with it. This was purely and simply a recognition strike. The case at hand is totally different. The materials filed indicate that Local 793's only motive, for picketing or threatening to picket the sites, was the signing of a collective agreement with Associated. This was in lawful reliance on the No Board Report.

24. The restriction of picketing in relation to a lawful strike is clearly within the jurisdiction of the Board. (see: *Sarnia Construction Association*, [1982] OLRB Rep. June 922; *Bird Construction Company Limited* [1985] OLRB Rep. March 359.) We find that in the circumstances of this case, it is unnecessary to rule on whether a total ban on picketing, pursuant to a valid "No Board Report", would render the No Board Report null and void.

25. The facts of this case are unusual to say the least. All parties have worked very hard to preserve all their legal rights and positions. Even in respect of the pleadings and processing of this case, the parties insisted on an unusual format which included stipulated positions in an attempt to preserve arguments in a certain way, for proceedings which might or might not take place in the future. With respect to the certification proceeding, neither party was prepared to acknowledge, for the purpose of that proceeding, that Associated had bargaining rights. Associated did not acknowledge bargaining rights because it contended that Local 793 had abandoned bargaining rights. In its view, since the Union was no longer the bargaining agent for the employer, it was willing to put Associated's employees on the employer's list. This position is consistent with the position Associated took before the Board in respect of this case. The Union, for its part, acknowledged that Associated and Local 793 were bound to a collective agreement that expired on April 30, 1992, however took the position that employees of Associated were properly subject to the certification application. In effect the Union was attempting to set up a defence to a finding of abandonment should it be certified. The position of the Union is summed up in the December 23 1992 letter reproduced above. Since the abandonment issue had not been decided or even placed before the Board, neither party was prepared to unleash a legal argument which would affect its overall position until the issue of abandonment had been decided.

26. Associated asserts that the *only* purpose for picketing against Associated, was to get it, and the rest of the Capobianco family to sign a collective agreement. Associated bases this conclusion on the fact that Local 793 has applied for certification against Associated and the related com-

panies within the Capobianco family. Associated asserts that the predominate reason for picketing was "voluntary recognition". Counsel asks the Board to find that, on the basis of the certification application alone, Local 793's purpose for picketing is unlawful.

27. Local 793 has set up a multiplicity of positions which, on their face, seem inconsistent. However in reality, they are answers to positions taken, or about to be taken, by Associated. Local 793 has demonstrated and we so find, that the predominant purpose of the threatened picketing was to put economic pressure on the primary employer so that the primary employer would sign a Collective Agreement. In this case we are unable to find that the threatened picketing was in connection with an unlawful purpose. In fact, the pressure threatened to be exerted on the employer is pressure that is specifically contemplated by the *Act*.

28. After the Board ruled on the second preliminary matter, the parties advised the Board that they wished to sign a collective agreement in the presence of the Board. The parties jointly requested an opportunity to stipulate positions prior to signing and they also requested that these stipulations be recorded in this Decision.

29. The following are the parties stipulated positions. Associated's counsel stipulates that Mr. Capobianco is signing the collective agreement under duress, specifically as a result of what Associated considers to be unlawful picketing. Counsel appreciates that this matter has already been decided in light of the Board's rulings. Counsel further submits that Associated does not intend to voluntarily implement the collective agreement. All of the foregoing is intended to be without prejudice to the position of Associated in relation to any court proceeding which may be commenced. It is Associated's understanding that Local 793 does not agree that there is any duress or unlawful picketing and that Local 793 may or will institute proceedings forthwith to require compliance with the renewal collective agreement. On the basis of these representations, the decisions of the Board herein, and the signing of the collective agreement this matter may be disposed of by the Board.

30. Counsel for Local 793 stipulates that the renewal collective agreement is not being signed under duress. In particular Local 793 denies that there has been any unlawful picketing and relies on the Board's preliminary rulings in this matter to the effect that the union is in a lawful strike position with a valid "No Board Report" in relation to Associated. Local 793 has put Associated on notice that it is going to enforce compliance with all terms and conditions of the collective agreement, and take all necessary proceedings against Associated in respect of enforcing the collective agreement. Further, the execution of the renewal agreement is without prejudice to all outstanding proceedings. In light of the above stipulations, and the signing of the collective agreement, the respondent requests that both applications be dismissed.

31. As we ruled orally, after the parties signed the Collective Agreement, which settled all the outstanding issues, and for the foregoing reasons these applications are dismissed.

0874-93-M; 3583-92-R; 3584-92-R London and District Service Workers' Union, Local 220, Applicant v. **Charterways Transportation Limited** (at Kitchener, Ontario), Responding Party; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222, Applicant v. Charterways Transportation Ltd. (Ajax) and the Corporation of the Town of Ajax, Responding Parties

Conciliation - Constitutional Law - Reference - Related Employer - Sale of a Business - Whether labour relations of bus service company offered through local branches at Ajax and Kitchener falling within provincial jurisdiction - Bus service company engaging in "regular and continuous" cross-border charter activity among its various activities - Board finding that bus services offered across the province through local branches constituting core undertaking - Each branch not constituting separate undertaking within constitutional sense - Board advising minister that parties' labour relations falling within federal jurisdiction

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. W. Pirrie* and *J. Redshaw*.

APPEARANCES: *L. N. Gottheil*, *Gord Vickers*, *Simon Threlkeld* and *Susan Collins* for CAW Local 222; *L. Steinberg*, *B. Quistgaard* and *Paul Middleton* for London and District Service Workers' Union, Local 220; *Thomas A. Stefanik*, *Bill Heslop* and *Don Dewar* for Charterways Transportation Limited; *Richard J. Charney*, *Rick Parisotto* and *Terry Barnett* for The Corporation of the Town of Ajax;

DECISION OF THE BOARD; November 9, 1993

Background

1. Board File No. 0874-93-M is a referral to the Board by the Minister pursuant to section 109 of the *Labour Relations Act*. The applicant union, London and District Service Workers' Union, Local 220 had requested the appointment of a conciliation officer with respect to its negotiations with the employer, Charterways Transportation Ltd. On March 4, 1993 the Minister appointed a conciliation officer to confer with the parties and endeavour to effect a collective agreement. On April 15, 1993, Charterways raised an objection to the Minister's authority to appoint a conciliation officer, asserting that its business was a federal undertaking and therefore not subject to the jurisdiction of the *Labour Relations Act*. The Minister thereupon referred the following question to the Board for its advice:

Do the labour relations between the parties fall within federal or provincial jurisdiction?

2. Around the same time, CAW-Canada and its Local 222 filed applications before the Board pursuant to sections 1(4) and 64 of the *Labour Relations Act* (Board File Nos. 3583-92-R and 3584-92-R), naming as responding parties both Charterways and The Corporation of the Town of Ajax. In those proceedings, Charterways raised a constitutional objection to the jurisdiction of this Board, similar in nature to the objection it raised with the Minister, referred to above. The parties in those proceedings subsequently agreed to place the constitutional issue before the instant panel, and to be bound by the decision reached by this panel in that respect. For this reason, although the constitutional question initially came before this panel by way of Reference from the Minister, the style of cause reflects all three proceedings.

3. Charterways is a company which carries on business in Ontario in two major areas: first, it provides various bus services to towns or communities, or to customers within those towns or communities, and second, it provides freight, warehousing and cartage operations. It is only the bus services which are in question in the instant proceeding. The bus services include school bus operations, which are provided for various Boards of Education, a few municipal transit operations provided for towns or municipalities, and charter bus services provided on request on an "as needed" basis. The bus services are provided at twenty-three branches, each based in a different town or municipality in the province.

4. A number of different bargaining agents represent bargaining units at different branches. Not all branches have unions. The different branches have not before now conducted their labour relations under a common jurisdiction. Some branches have been treated as under federal jurisdiction and some as under provincial. Recently, Charterways concluded that this patchwork approach was inefficient and unduly expensive. Charterways was of the view that its bus services, including extra-provincial charters, were a single undertaking, and because of the extra-provincial charters, was constitutionally federal in nature. It therefore concluded that all branches properly fell under federal jurisdiction, and it asked the bargaining agents of bargaining units that had historically conducted matters under provincial jurisdiction to agree henceforth to be covered by federal labour legislation. Both the London and District Service Workers and the CAW refused.

5. Both unions argue that their branches constitute separate and distinct undertakings, in the constitutional sense, and fall under provincial jurisdiction. Additionally, the CAW argues that the Ajax Transit operation itself ought to be considered a separate undertaking, even if the entire Ajax Charterways operation is not. If the individual branch at Ajax or Kitchener is a separate undertaking (or if Ajax Transit is a separate undertaking), then the nature of the activities of the branch (or of Ajax Transit) are not such as to oust provincial jurisdiction. The unions assert that the extra-provincial bus activity emanating from these two locations is minimal and irregular at best.

The Facts

6. As noted, there are approximately twenty-three branches of Charterways in different communities or towns across Ontario. All branches are administered and coordinated from Charterways' headquarters in London, Ontario, by its "Bus Division", which is responsible for all of Charterways' school bus, transit and charter operations.

7. Each branch offers school bus services to the local Boards of Education. Charterways sells to Boards a package under which it provides vehicles and drivers to perform the "to and fro" regular daily school bus activities.

8. Currently, only two of the branches, Orangeville and Cobourg, provide on contract the local transit service for the town. Until late 1992 or early 1993, transit service was also contracted for and provided by Charterways in Ajax. The Ajax Transit service contract was not renewed by the Town of Ajax, and the Town itself took over the service.

9. Charterways branches all offer charter services, intra or interprovincial in nature, on an "on request" basis. Not surprisingly, there are large number of requests for charters at some locations (the larger Metropolitan areas) and fewer requests in smaller communities. Similarly, requests for cross-border or extra-provincial charters are significantly greater in border communities such as Windsor, Sarnia, St. Catharines, or Ottawa, and substantially fewer in communities not located near the provincial border. In the 1991-92 and 1992-93 fiscal years, there were in total

approximately seven extra-provincial charters requested and conducted from Kitchener, and two from Ajax. Charter revenue represents approximately ten per cent of the total revenue of Charterways in Ontario, and extra-provincial charter revenue represents approximately one per cent of the total. In the two prior years, fifteen out of twenty-three branches conducted at least some extra-provincial charters.

10. Each branch is run locally by a manager (the titles of this position vary), but the head office in London sets all major policies and makes almost all major decisions. Contracts with Boards of Education for school bus services and transit contracts with municipalities are negotiated and approved by headquarters. Each branch has its own budget, covering all types of bus services provided, but this budget is set for each branch by head office. Employees at all branches are paid through a centralized payroll service. The local branch issues invoices and bills local customers, and collects on those invoices. Each branch has a bank account for the receipt of such funds, but at the end of each business day all funds are transferred automatically to headquarters. For purposes of expenditure, all capital expenditures of any note have to be approved and authorized by head office. Local managers have credit cards for the purchase of certain things, such as fuel, parts and so on. However, credit card statements are forwarded to head office for payment by head office.

11. With respect to labour relations matters, except for day-to-day decisions, policies are coordinated on a province-wide basis by head office. All negotiations for collective agreements are supervised by and conducted by head office, even though the agreements encompass only single branches or parts thereof. While local managers participate in negotiations for their branch, final decisions are made by headquarters. The local manager is responsible for hiring bargaining unit employees, and for day-to-day disciplinary matters. However, before discharging any employee, headquarters must approve. Headquarters personnel take over grievances from the third stage of the grievance procedure on, including the decision as to whether the matter goes to arbitration. Driver training and safety procedures are coordinated and run by headquarters.

12. Day-to-day operations of each branch are largely conducted on an autonomous basis, subject to the matters noted above. Each branch is run by a local manager. Each branch has a contract to provide local school bus services. Each branch is equipped to provide charter services, both within the province and crossing the border, as each branch has drivers and vehicles licensed to operate beyond the boundaries of the province. School bus and transit service decisions involving schedules, routes, the day-to-day working schedules of employees, and so on, are all made at the local level. Customers for charter trips or bus rentals will phone the local branch of Charterways and arrange to rent a Charter.

13. There is limited interaction between branches. There is some transfer or exchange of school buses between branches, though none of transit buses (different types of vehicles are generally used by Charterways to provide these two kinds of bus services). There is some regular transfer or movement of local managers between branches. There is limited exchange of parts between branches.

14. Focusing on the Ajax municipal transit operation, Charterways provided the buses and drivers. The transit operation was run out of a city-owned transit facility. Transit buses were only used for transit purposes, and not for school bus activities in Ajax. The Charterways' transit drivers wore Town of Ajax uniforms, and drove (Charterways) buses that were identified as Town of Ajax municipal transit buses in conformity with schedules, routes, and fares set by the Town of Ajax. Most of the transit drivers were full time transit drivers. Approximately ten per cent of the school bus drivers (who were part-time employees) also drove for the transit operations, usually on Saturdays or to replace full-time transit drivers on sick or vacation leave.

15. In Ajax, school buses were used for charters, and were driven by school bus drivers. As noted, cross-border charters emanating from Ajax were limited, consisting of only two in the last two years.

16. Turning to Kitchener, there was no transit operation run by Charterways in Kitchener. The predominant activity was the provision of school bus services to the local Boards of Education. There was some charter activity, including four to seven cross-border charters in the last two years. As with Ajax, school buses were used for these charters, and the school bus drivers drove the charters.

Decision

17. Local 220 and CAW and its Local 222 argue that the bargaining units which they respectively represent fall under provincial labour law jurisdiction. They assert that each branch is a separate undertaking, within the constitutional sense, and that the activities of the particular branch are not of such a nature as to oust the presumptive provincial jurisdiction. Neither union argued that the charter services provided by Charterways constituted a distinct undertaking, separate from the transit and/or school bus activities. It was therefore not argued that the different services provided constituted different undertakings. Rather, it was submitted that each of the Kitchener branch and the Ajax branch, (or Ajax Transit operation) constituted separate and distinct undertakings.

18. The parties agree that the cross-border charter activity engaged in by Charterways across the province is of a regular and continuous nature. In effect, the unions acknowledged that Charterways would fall under federal labour relations jurisdiction if the Board concludes that the undertaking in question is all of the bus services of Charterways in Ontario, across all branches. In turn, Charterways agrees, if the Board reaches the opposite conclusion and concludes that each branch constitutes a separate undertaking for constitutional purposes, that the two branches would at the present time each fall within provincial jurisdiction.

19. The appropriate legal approach is not in dispute. In *Central Western Railway Corporation v. United Transportation Union et al*, (1990) 76 D.L.R. (4th) 1 (S.C.C.), the Court wrote as follows, at page 8 therein:

"There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s.92(10)(a) as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s.92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject-matter in question is integral to a core federal work or undertaking."

20. As the Court noted, though related, these two approaches are distinct. Here, the initial question we must answer involves determining the nature of the undertaking. Once the undertaking has been defined, we can consider whether it is itself a federal work or undertaking (the first approach), or if not, whether it is integral to another federal work or undertaking (the second approach). If the undertaking is found to be province wide, beyond the individual branch, the parties effectively agree that the company falls under federal jurisdiction. We only arrive at the second question if we determine that the undertaking or work is the operation of a single branch (or the Ajax Transit system). In that event, the parties effectively agree that the branch is under provincial jurisdiction.

21. We were referred to a number of cases by the parties. Many of the cases are of little assistance however, in addressing our initial question, which is to determine the nature of the business, as those cases consider the second question or approach, whether some matter that is not itself federal in nature is so intricately related to a core federal work or undertaking that it is infused with the federal regulatory power.

22. Is each branch a separate undertaking? It is true that the branches run day-to-day operations on a relatively autonomous fashion, and that at this operational level, there is relatively little, if any, meaningful interaction between the branches, or between the individual branch and headquarters in London. Nevertheless, we cannot conclude that each branch, more specifically Kitchener and Ajax, constitute separate federal works or undertakings, within the constitutional sense.

23. All the branches, including the two in question, are engaged in the same basic undertaking, which is to provide a variety of bus services to local customers. In essence, each branch is simply the local geographical terminal at which this same bundle of services is provided or is available upon request. Each branch is the local depot at which the same bus services are offered to the local customer base.

24. This bundle of services is coordinated and run by Charterways on a province-wide basis. Charterways headquarters negotiates and signs the contracts under which all the services are provided. It negotiates the individual collective agreements with the various bargaining units. It coordinates and exercises decision-making with respect to discharges of employees and it makes the decisions on whether labour relations grievances go to arbitration. Budgets for each branch are set by headquarters. All funds are transferred at end of each business day to headquarters. Headquarters pays the bills, including the credit card invoices. Headquarters performs all these functions centrally for all branches.

25. A branch could not survive and operate without the continued supervisory and directory role played by headquarters. This is true both for each branch, and for the Ajax Transit system. Functionally speaking, the Ajax Transit operation represents a contract Charterways has at the time, performed by its Ajax branch. That branch continues without that contract. It is still part of the province-wide string of local offices of Charterways.

26. Again, many of the cases placed before us are of little assistance. Local 220 relies upon *Val Nord Bus Lines Limited et al*, (1990) 14 C.L.R.B.R (2d) 132. However, that case arises in a context in which there was a core federal undertaking, and the issue was whether another undertaking was integrally related to the core federal undertaking. Here, we have concluded that the federal undertaking consists of Charterways bus operations across the province, and not only in one branch. For *Val Nord* to be on point, we would have had to conclude that a branch is itself a separate undertaking.

27. The CAW relies upon the "Empress Hotel" decision (*C.P.R. v. A.-G. B.C.*, [1950] 1 D.L.R. 721 (J.C.P.C.)) In that case, the Court decided that a hotel operated by a railway was a separate undertaking from the federal core undertaking, the railway system. As such, the Empress Hotel fell under provincial labour regulation. If it was asserted before us that the charter operations were a severable and distinct undertaking from the other bus services offered across the province by Charterways, then this decision would be more on point. That decision considers whether a separate service or operation, or undertaking for constitutional purposes (the hotel operation by the railroad) was integrally related to the federal railway undertaking. Here, the argument is that all services issued at the local geographical depot, including the charter services, constitute a separate undertaking.

28. To the extent the courts have charged adjudicative bodies to take a functional and practical view in determining the nature of the core undertaking we note that the effect of acceding to the unions' argument that each of the twenty-three branches constitutes a separate undertaking would lead to impractical results. Since the extra-provincial activity at any particular branch would fluctuate, depending on the frequency of extra-provincial charters at any point in time, and since regular and continuous extra-provincial charters would cause an undertaking to fall under federal jurisdiction, branches could flip flop between federal and provincial jurisdictions, depending on the extent of the extra-provincial charter activity at any point in time. Any time the level and frequency of this activity meaningfully changed, a party could again raise the constitutional issue. The branch could be federal one month, provincial the next. Charters are operated on an "on request" basis, and one can reasonably expect their volume and timing to fluctuate significantly.

29. Accordingly, it is our view that the core undertaking here is the bus services offered by Charterways across the province, and provided through the local branches. We do not find that each branch constitutes a separate undertaking, within the constitutional sense. It follows that the alternative position of the CAW, that the Ajax Transit operation constitutes a separate undertaking, cannot prevail.

30. As noted, the parties effectively agree that this finding is dispositive of the issue before us, and that Charterways would therefore fall under federal jurisdiction. In the result, our response to the Minister's question is that, in our view, the labour relations between the parties fall within federal jurisdiction.

1206-92-JD Ellis-Don Limited, The Jackson-Lewis Company Limited and Eastern Construction Company Limited, Applicants v. United Brotherhood of Carpenters and Joiners of America, Local 27, and Labourers International Union of North America, Local 183, Responding Parties

Adjournment - Jurisdictional Dispute - Practice and Procedure - Sector Determination - Carpenters' and Labourers' unions disputing assignment of carpentry portion of concrete forming work in relation to various outdoor concrete structures, including retaining walls, seating walls, planters and curbs - Labourers' union raising "sector" issue and arguing that "consultation" should be adjourned so that full hearing into sector issue can be held and notice given to all parties - Board satisfied that it can determine sector issue for purpose of jurisdictional dispute proceedings on basis of material before it and consultation with parties - Board satisfied that work in dispute falling in ICI sector and not in "landscaping" sector as submitted by Labourers' union - Board satisfied that trade agreement between Carpenters' and Labourers' union and that area practice supporting Carpenters' union claim - Board directing that work in dispute be assigned to Carpenters' union

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *Joseph Liberman* for the applicants; *S.B.D. Wahl* and *T. Dionisio* for Labourers, Local 183; *James Nyman* and *Frank O'Reilly* for Carpenters, Local 27.

DECISION OF THE BOARD; November 4, 1993

1. This is a complaint concerning work assignment filed pursuant to the provisions of section 93 of the *Labour Relations Act*. On June 1, 1993, the Board held a consultation with the parties, in order to consult with the parties on all matters raised by the complaint. Pursuant to section 93(1.2) of the Act, the Board may make any interim or final order it considers appropriate after consulting with the parties, or may inquire into any matter raised by the complaint.

2. At the consultation the Board was informed that the complaint insofar as it relates to Konvey Construction Limited has been settled. The complaint by Konvey Construction Limited is withdrawn by leave of the Board and the title of the proceedings is thus amended to delete reference to it.

3. The remaining parties will be referred to herein as “the companies” or “Ellis-Don”, “Jackson-Lewis” and “Eastern”, and “the Labourers” and “the Carpenters”.

4. At the outset of the consultation, counsel for the Labourers requested that notice of these proceedings be given to all persons and trade unions that have any contact with the construction undertaken at the job sites which are the subject of this jurisdiction dispute. Counsel stated that notice was required because in the course of this complaint, the Labourers have raised an issue as to which sector the work in dispute belongs, and the disposition of this issue should involve all interested parties. Further, counsel requests that the Board hear evidence with respect to the sector issue. Counsel thus indicated that the Board would not be able, in light of the sector issue, to deal with all matters raised by the complaint with a view to making a final order on the jurisdiction dispute. Counsel also suggested that it would be necessary for the Board to hear evidence on other issues raised by this jurisdiction dispute before making a final order.

5. After hearing submissions from all parties on the matters raised by the Labourers, the Board ruled that it would reserve on the request that notice be given to other persons with an interest in the construction projects at issue, and on the necessity of hearing evidence on any of the issues. We ruled that we would proceed to hear the representations of all parties with respect to all of the issues raised by the section 93 complaint. The parties are well aware of the factors that this Board takes into account in making determinations of work assignment. The issue of the existence of a landscaping sector was raised by the Labourers in resisting the application of a trade agreement on which the Carpenters rely. In hearing the parties’ arguments, therefore, the Board expected that the parties would direct themselves to the applicability of this agreement to the work in dispute.

6. The applicability of this agreement is, however, only one of a number of factors which may be relevant to the determination of this jurisdiction dispute. We indicated to the parties that we expected them to direct their submissions to *any* factor on which they seek to rely for the determination of this dispute. We indicated that at the conclusion of the submissions and on review of the material, we will determine whether the Board will hold a hearing, whether it will require any oral evidence to be led, whether it will require notice to be served on other parties, and whether it will make any interim or final order on the issues raised in this complaint under section 93.

Background of the Dispute

7. A brief outline of the history of this proceeding is in order. Between November 1991 and April 1992, the Carpenters filed grievances against the three applicants with respect to the sub-contract of certain work to contractors which employed members of the Labourers to perform the work. The issue underlying all these grievances was the assignment of work to members of the Labourers instead of to members of the Carpenters. On July 1992, the three companies filed a joint complaint under section 93 regarding the work in dispute under the grievances.

8. It was the position of the Carpenters that the work in dispute involves the carpentry portion of concrete forming construction work in the industrial, commercial and institutional sector of the construction industry ("ICI sector"), and that jurisdiction over this work had been assigned to the Carpenters pursuant to an agreement between the Carpenters and Labourers dated May 15, 1991.

9. In its reply to the section 93 complaint, the Labourers stated:

The Work in Dispute falls within the Landscaping Sector of the construction industry and/or within the roads, sewer and watermain, utilities, heavy engineering and/or electrical power systems sectors of the construction industry dependant upon the particular application of landscaping work at the project. Accordingly, the Ontario Labour Relations Board must determine the applicable sector of the construction industry within the context of this Complaint Concerning Work Assignment. It is the primary position of Labourers, Local 183 that the landscaping construction work at any of the named projects does not fall within the industrial, commercial and institutional sector of the construction industry. Accordingly, a determination by the Ontario Labour Relations Board pursuant to Section 152 is required in the course of these proceedings.

10. In the course of these proceedings the sector issue has been narrowed so that the dispute is whether the work in question is in the ICI sector or is in a yet unrecognized sector known as the "landscaping sector".

11. On September 30, 1992, the Board convened a pre-hearing conference with the parties for the purpose of narrowing the issues in the jurisdiction dispute. The panel presiding over the pre-hearing conference noted in its report that, with respect to the sector issue,

[W]hether the work in dispute is in the ICI sector, as maintained by the Carpenters, has implications for the "peace treaty". The complainants and the Labourers maintain that the work in dispute is not work which falls within the ICI sector.

The complainants want the sector issue determined first and separate from the merits of the jurisdictional dispute. The Labourers prefer that the sector issue be dealt with during the course of the merits of the jurisdictional dispute. The Carpenters want the Board to hear the sector issue together with the merits of the jurisdictional dispute.

12. On January 4, 1993, the Board convened a consultation with respect to this complaint, before this panel, in accordance with section 93(1.1). After hearing submissions from the parties with regards to various preliminary issues, the Board made certain rulings, contained in a decision of February 11, 1993. Amongst other things, the Board ruled that it would not split off the "sector issue" into a separate proceeding, as requested by counsel for the companies. Instead, the panel stated, "[i]f in the course of making our determinations on the complaint, this panel is required to determine whether the work in dispute is governed by the agreement between the Carpenters and the Labourers, and the resolution of this issue requires a determination as to which sector the work belongs to for the purposes of that agreement, then we will deal with this issue in the course of dealing with the complaint." [para. 30]

13. In its decision of February 11, this panel also directed detailed further filings from the parties. Amongst other things, the Labourers were directed to state all of the facts on which they rely in support of their position that the work in dispute is in the landscaping sector and is therefore not covered by the agreement with the Carpenters, and to file copies of any documents on which they will rely in this matter.

14. In response to the Board's directions, the Labourers and the Carpenters filed, over the next several months, voluminous documentation with respect to the issues raised in this proceeding, in addition to documentation which had already been filed. All parties have had ample time to

review each other's materials, and to respond with further filings if necessary. The issues in dispute are apparent from the materials filed and the parties have had an opportunity to address them in their own filings.

15. Additionally, in a further decision of the Board dated March 15, 1993, the Board stated:

1. ... For the assistance of the parties, the Board reiterates that this complaint concerning work assignment is scheduled for consultation before the Board on May 18, 1993 [adjourned on agreement of the parties to June 1]. The purpose of the consultation is to consult with the parties on *all* matters raised by the complaint, including whether or not the work in dispute is covered by a trade agreement and in this regard the parties are referred to paragraph 30 of our prior decision of February 11, 1993. The filings directed by the Board include a statement of facts and any materials on which the parties rely to support their positions on the applicability of the agreement, including their positions based on "sector".

2. After consulting with the parties, the Board may make any interim or final order it considers appropriate, or may inquire into any matter raised by the complaint.

Description of the Work in Dispute

16. The work in dispute was generally described in the Board's decision of February 11, but has been further clarified since. With respect to Ellis-Don, it involves the carpentry portion of concrete forming work in relation to various outdoor concrete structures on the Metro Hall site in downtown Toronto. These structures include retaining walls, seating walls, structures relating to an elevated stage, planters and curbs.

17. With respect to Jackson-Lewis, the work is also the carpentry portion of concrete forming construction work, and encompasses various outdoor concrete structures on the Hewlett Packard site in Mississauga, including retaining walls, seating walls, signage structures, planters and curbs.

18. With respect to Eastern, the work in dispute is also the carpentry portion of concrete forming work in relation to various outdoor concrete structures on the Confederation Life site in downtown Toronto including retaining walls, seating walls, planters and curbs.

The Sector Determination

19. We do not intend to review the submissions of the parties in detail. All referred to and relied on the briefs and books of documents filed. Counsel for the Labourers submitted that section 153 of the Act requires the Board to determine whether work is in the ICI sector, where that has been put in issue. Further, for the purposes of such a determination, the Board cannot apply the procedures provided for in section 93, but is obliged to hold a hearing and hear evidence. The Board must adjourn the consultation in order to give notice of the sector issue to all affected parties. The companies take no position on whether the work in dispute is in the ICI sector, but agree that once a request for a sector determination has been made, the Board is obliged to hold a hearing and decide the issue.

20. In the case before us, the sector issue arises in the context of a jurisdiction dispute. It has been no secret that jurisdiction disputes have over the years been the focus of lengthy and costly hearings before the Board. The adjudication of the simple question "which trade should do the work?" has resulted in hearings thirty and forty days in length. The Act as amended recently has provided a response to the calls from the community for a better procedure to answer that question. As outlined by the Board recently:

9. For years prior to January 1, 1993, the construction labour relations community cried out for a more responsive and expeditious jurisdictional dispute process before the Board. On January 1, 1993 the present section 93 of the *Labour Relations Act* came into effect. This provision is a response to the community's call and contemplates a much more expeditious procedure. The Board's new Rules of Procedure with respect to jurisdictional dispute (Rule 72-76) complement the new section 93 of the Act and also contemplate a radically expedited procedure. The Act and the Rules both contemplate that a complaint concerning work assignment may be disposed of without an oral hearing. The Act specifically gives the Board a discretion with respect to whether or not it will entertain a jurisdictional complaint, and also with respect to how the Board proceeds with a complaint it decides to entertain (section 93(1.1)). The Act goes on to provide that the Board may make any interim or final order it considers appropriate after holding a consultation *or* a hearing (section 93(1.2)).

10. In this case, the Board found it appropriate to schedule a consultation, a proceeding which is something less than a hearing in the traditional sense. Nevertheless, a consultation is an opportunity, perhaps the only opportunity, for the parties to a jurisdictional dispute complaint to address the Board with respect to the matter. The rules of natural justice do not apply to such a proceeding in any traditional sense. However, the parties are afforded the opportunity to refer to the extensive materials which they are required to file in such cases, and to make representations with respect to how the Board should proceed (including whether the Board should hear evidence or otherwise hold a hearing on any matter or issue) or dispose of the complaint. (*Ontario Hydro et al.* Board File No. 3238-92-JD, dated May 12, 1993, as yet unreported).

21. In the case before us, as well, the Board scheduled a consultation with the parties. As with jurisdiction disputes that proceed in this manner, it may be that after holding a consultation with the parties, the Board will decide that it is necessary to hold a hearing on some or all of the issues raised by the jurisdiction dispute. The decision whether or not to proceed to hear evidence is a decision that the Board will be in a position to make after its initial consultation. The Board does not proceed to a hearing on the mere request of a party.

22. In the case before us, the Board has been asked to decide whether the Carpenters or the Labourers ought to have been assigned specific work on three projects. That is the issue whose determination is the purpose of this jurisdiction dispute. In the course of setting forward its positions on the jurisdiction dispute, the Labourers have asserted that the Board must determine whether this work is in the ICI sector, or in the "landscape" sector, a sector not referred to in the Act. This issue arises because of the terms of a trade agreement between the Labourers and the Carpenters, dated May 15, 1991, which, among other things, provides:

3. The carpentry portion of concrete forming construction work on any other project in the Geographic Area which may be found to be in the ICI sector of the construction industry, other than on the projects referred to in paras. 1 and 2 above, shall be performed exclusively by members of Local 27 employed under the Carpenters' Provincial Agreement.

23. The position of the Labourers is that the work in question is not covered by the trade agreement because it is not work in the ICI sector. The Board has a responsibility at this juncture to determine whether that issue regarding sector is one which is necessary to be determined in order to dispose of the jurisdiction dispute. If the Board is satisfied that it is indeed necessary for the determination of the jurisdiction dispute to make a finding as to what sector the work is in, the Board must also determine whether it is possible to decide this issue within the framework of the consultation procedures, or whether evidence is required on the issue.

24. We are satisfied on the material before us that the jurisdiction dispute can be determined without the necessity of an oral hearing, either on the sector issue or on any issue raised by these proceedings. We are satisfied that we can determine the sector issue for the purpose of these proceedings, on the basis of the material before us and the consultation with the parties.

25. There is no obvious reason to us why the issue of sector, since it has been raised in the context of this jurisdiction dispute, cannot be determined within the course of these proceedings. The Labourers assert that the Board is obliged to hold a hearing with respect to the sector issues because of the provisions of section 153 of the Act. They also assert that such a hearing must be held after notice to all affected parties. They rely in this on a number of previous decisions of this Board in which the Board has adjourned other proceedings (such as grievances or jurisdiction disputes) in order to give notice to affected parties of a sector dispute, and has held a hearing with respect to a sector dispute.

26. It is important to note that the context of these previous Board decisions is quite different from our current context. There were no provisions previously for the resolution of jurisdiction disputes after a consultation with the parties. There was no question that once a complaint regarding a jurisdiction dispute was filed with the Board, the Board would determine it after an oral hearing. In some cases, it was more efficient to hear the sector dispute separately, since it was possible that the determination of that issue would assist in narrowing the scope of other issues in the main proceeding. However, in all cases, the Board was operating within the traditional framework of oral hearings.

27. The *Labour Relations Act*, however, has been recently and specifically amended to provide for greater flexibility to the Board in determining jurisdiction disputes. We have set out above the effect of these amendments. We read the provisions of section 93(1.2), permitting the Board to make any interim or final orders with respect to a jurisdiction dispute after consultation with the parties, to permit the Board also to make any findings necessary to these interim or final orders, including any findings on sector.

28. In the case before us, the parties were put on notice by the Labourer's Reply to the complaint that a sector issue would be raised. The Board ruled on February 11 that this issue would be dealt with in the course of the jurisdiction dispute if necessary. The parties were provided with the opportunity to file further materials with respect to the sector issue. Further, they were provided with the opportunity, and specifically invited to make full representations with respect to all issues raised by the jurisdiction dispute, including the sector issue, at the consultation.

29. With respect to the issue of notice, we are satisfied that in the circumstances of this case, it is unnecessary to give notice of the sector issue raised to any additional parties. We note that all of the contractors who have performed the work which is specifically in dispute and which the Labourers assert is work in the landscaping sector, have been sent copies of Board correspondence on these matters, including notice of these proceedings and copies of all decisions to date.

30. Additionally, we emphasize that the provision of notice to other parties of Board proceedings serves two distinct functions. Where the other parties are clearly affected parties in the sense of having a direct legal interest in the outcome of the proceedings, the Board must, in the interests of natural justice ensure that those parties have the opportunity to participate in the proceedings. On the other hand, there may be cases where other parties do not have a strictly legal interest, but are invited to participate in a proceeding. In these latter cases, the Board may act out of a desire to ensure in the interests of labour relations stability, and particularly where the dispute involves a major project with many participants, that its rulings have general application. Thus, in a number of cases which have involved sector determinations, the Board has applied a broad concept of "affected parties" to include all parties which have a direct connection to a job site.

31. However, the Board has also, on occasion, determined the issue of sector in the course of making a determination with respect to a dispute between parties, without requiring notice of

the proceedings to be given to a broader group of interested persons: see *Ecodyne Limited*, [1979] OLRB Rep. July 629 and *Four Seasons Drywall*, [1990] OLRB Rep. May 525.

32. In the case before us, we are satisfied that all parties which have a direct legal interest in the outcome of this case have been provided with notice of the proceedings. We are also satisfied that we ought not to apply a broader definition of affected party to extend this notice to other parties. Although there may be cases where the issues raised ought to be determined with broader participation from the labour relations community, we do not find it necessary in the case before us to turn what is essentially a narrow disagreement over work assignment into a more generalized forum. Weighing the desirability of resolving the jurisdiction dispute without further delay (and we also take into account the fact that the notice issue was not raised until June 1), and the benefits of deciding some of the issues raised in this dispute in a more generalized fashion, we opt to resolve the dispute for the parties before us. We therefore decline to adjourn these proceedings to provide notice to other parties.

33. Turning to the merits of the sector issue, we are satisfied, having regard to all the material before us and the representations of the parties, that the work in dispute is work in the ICI sector of the construction industry. Even assuming for the present purposes there is a distinct sector known as the "landscaping sector", we are not satisfied that it extends to include the work in dispute. It does not appear to us that the concrete forming work in relation to the outdoor structures is materially different from the concrete forming work in relation to the building to which it is related. The types of materials used, skills required and problems and solutions to be dealt with are also similar. It may be, as the Labourers assert, that there are unique problems for concrete forming where its purpose is to sustain plant life. Yet it is also true that any concrete forming on an ICI project must take into account the particular needs of the structure being formed. Further, concrete planters are only one element of the work in dispute, much of which does not relate to plantings.

34. Further, part of the work is physically situated on or connected to the ICI structure. For instance, on both the Ellis-Don project and the Jackson-Lewis projects, many of the structures are located on an underground garage serving the building. Other aspects of the work are directly connected to the building. It is all work which was done in conjunction with the erection of an ICI building and which came under the overall responsibility of the general contractor responsible for the erection of the building. To the extent that it is relevant to look to "characteristic relations with employees" in deciding sector issues, the materials indicate that on many other similar projects, the work has been done by ICI formwork contractors. Sometimes the analogous work forms part of the overall formwork package for the project, and on occasion it has been done under a separate contract for formwork in relation to outdoor structures. As well, on some ICI projects, fewer in number than the above, the formwork has been part of a contract which also included general landscaping work. We are satisfied that, overall, concrete forming work on outdoor structures on ICI projects has tended to be organized in the same or similar way as work on the ICI structure itself.

35. Although it is not necessary for us to decide, we are also satisfied, in any event, that there is no sector of the construction industry known as the "landscaping sector" which can be distinguished from the other sectors by virtue of its work characteristics. Section 119 of the Act defines "sector" for the purpose of the construction industry provisions as:

... a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermain sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.

36. It is important to note that section 119 does not include “landscaping” as a sector. It is also relevant to note that the definition does not appear by its words to be exhaustive, since it states that the notion of sector “includes” those sectors enumerated. The Labourers rely on the wording of section 119 to request that this Board find that landscaping is a sector of the construction industry for the purposes of the Act, and that the work in question is in the landscaping sector.

37. In the more than twenty years that this definition has been in Act, there have been no cases before the Board where the Board has found a sector in addition to those enumerated. There have also been no cases where the Board has been required to decide whether the list of sectors in section 119 is exhaustive. The Board was referred to only one case in which a party has argued for the recognition of a new sector under the Act, *The Ontario Erectors Association*, [1973] OLRB Rep. Aug. 444, which was an application for accreditation. The panel in that case did not determine whether the list of sectors found in section 119 is exhaustive, but found that the evidence and representations did not support the establishment of a new sector. Among other things, the Board stated:

5. ... The Board is not satisfied that the “work characteristics” of the proposed structural steel and mechanical erection sector are unique to such a sector. Moreover, the proposed sector would encompass a part of most if not all of the sectors specifically named in section 106(e). Having regard to foregoing considerations, the interveners have justifiable reasons for their apprehensions as to the results which they anticipate would flow were the Board to recognize structural steel and mechanical erection as a sector. Accordingly, in all the circumstances the Board is not prepared to acquiesce in the request of the applicant and establish a structural steel and mechanical erection sector. The Board therefore further finds that the unit of employers for which the applicant is seeking accreditation is not an appropriate unit of employers for collective bargaining.

38. In the case before us, as well, it is unnecessary to decide whether the list of sectors in section 119 is exhaustive. We are not satisfied having regard to the materials before us and the representations of the parties that there is a division of the construction industry distinguishable by its work characteristics, known as the “landscaping sector”. It is clear to us that there are a number of contractors who perform work similar to the work in dispute under the terms of a common collective agreement with the Labourers which the Labourers call the “Landscaping Agreement” which, parenthetically, also appears to cover work outside of the construction industry. On the other hand, it is also clear that there are a number of contractors who have performed similar work using members of the Carpenters under the terms of the Carpenters provincial collective agreement.

39. Further, the collective agreement on which the Labourers rely to support their assertion that there is a distinct pattern of collective bargaining relationships in the “landscape sector” is limited in geographic area to two Board areas, 8 and 18. If the Labourers seek recognition of a sector which is confined to these two Board areas, this would conflict with the province-wide application of the term “sector” in section 119. If the Labourers seek recognition of a province-wide landscape sector, we find this collective agreement to be less than compelling grounds to justify this.

40. The Labourers state that the “single most influential determinant of landscaping construction is the creation of an environment that can support plant life.” However, much of the work that the Labourers seek to characterize as landscaping work has nothing to do with plant life, including the construction of outdoor seating areas, plazas, retaining walls and other outdoor structures. We are also aware that structures that hold plant life can be constructed within a building as well as outside a building.

41. Some of the functions and materials associated with the proposed sector are common to work in many of the existing sectors, such as the work functions and materials used in the concrete

forming in dispute. As we have stated, no doubt some of the functions and materials can be considered quite special, such as the placing of plants. It would be tautological, however, to rely on this to establish a distinct sector, inasmuch as at all stages of construction on a project, there might be certain work functions or materials which can be considered unique to that stage.

42. Ultimately, we would not find it wise to further fragment construction projects by carving out the "outside construction" from the project as a whole, just as the Board in *The Ontario Erectors Association, supra*, found it unwise to carve out structural steel and mechanical erection as a sector. Given the absence of a clear and unambiguous practice in the construction industry to treat this work as a discrete sector, in our view, the creation of a new sector as proposed would be disruptive and divisive.

43. We therefore are not convinced that there is a distinct sector known as the landscaping sector to which the work in dispute belongs.

The Jurisdiction Dispute

44. Having regard to our findings regarding the work in dispute, and in particular our finding that it is work in the ICI sector of the construction industry, we are satisfied that the Labourers and the Carpenters are party to a trade agreement in which they acknowledged that such work is to be performed by members of the Carpenters. As the Board has stated before (see among others, *Pigott Construction Limited* [1992] OLRB Rep. June 748), "peace agreements" between unions over work jurisdiction issues will be accorded great weight by the Board.

45. Turning to other factors which the parties addressed in their representations during the consultation, we are satisfied that both trades have the skills to perform the work in question. Both trades are involved in the carpentry portion of concrete forming construction work, as recognized by their trade agreement.

46. Both the Labourers and the Carpenters have filed extensive documentation to support their claim that both area practice and employer practice support the assignment of the work in dispute to their members. To the extent that the general contractors who are the applicants in this matter have control over the ultimate assignment of the work to a particular trade by having control over the choice of sub-contractor, we turn to a review of the practice of these contractors. To a greater or lesser extent, it appears that all of the applicants have in the past had analogous work performed by way of subcontracts with formwork contractors who have employed members of the Carpenters to perform the work. Further, Ellis-Don has on a number of projects performed similar work itself using members of the Carpenters under the terms of the Carpenters ICI collective agreement.

47. Other than the projects in dispute, the materials filed by the Labourers indicate that Ellis-Don has sub-contracted a small amount of concrete forming work on one project to a landscaping contractor as part of a package of work, which was then performed by members of the Labourers. As well, the materials contain reference to work including concrete forming which was sub-contracted by Jackson-Lewis on two occasions to a landscaping contractor, which in turn employed members of the Labourers. There is also reference to concrete formwork in connection with landscaping on another Jackson-Lewis project, but it is not possible to determine whether the work was in connection to ICI or residential construction.

48. The companies that actually performed the work were Underground Construction Ltd. ("UCL"), THM Construction Ltd. ("THM") and Woods Johnson and Associates Inc. ("Woods Johnson"). All of these companies have had notice of these proceedings, have been sent copies of

the Board's decisions on this matter to date, and none of them chose to participate in the consultation. From the materials before us, as clarified at the consultation, it appears that UCL performed the work using members of the Labourers applying the terms of a sewer and watermain collective agreement. Some of the work contracted to THM was further sub-contracted to a contractor which performed it applying the terms of a road builder's collective agreement.

49. It is not clear which collective agreement was applied to the performance of the work by THM, as the materials indicate that it became bound to a collective agreement covering landscape work as of October, 1992.

50. Woods Johnson was at the time of the performance of its work, bound to a collective agreement with the Labourers covering landscaping work.

51. The materials before indicate that THM has employed members of the Labourers in concrete formwork in connection with what is described as "landscaping construction" on a number of ICI projects. There is no evidence regarding any prior practice by UCL in connection with analogous work. The Labourers have also submitted documentation with respect to a number of projects on which Woods Johnson employed members of the Labourers; however, only one of these appears to involve concrete forming, and this work is on a residential project.

52. The Carpenters do not have collective agreements with THM, UCL or Woods Johnson.

53. With respect to the practice by other contractors, it appears that on many projects, both ICI and residential, the Labourers have performed concrete forming in relation to outdoor construction. Without exception, the concrete forming work appears to have been part of a larger package of work which is generally described in the materials as "landscaping construction", and which includes site grading, excavating and backfilling, earth retaining walls, and planting of garden material.

54. The Carpenters have done an extensive amount of similar work on ICI projects. On some jobs, the materials indicate that the work was included in the total forming package. On other jobs, the work was under a separate contract from the forming for the main structure. On most, it is not indicated. The Carpenters have also submitted photographs showing the work on the majority of projects on which they rely.

55. In general, it is fair to conclude that most of the analogous work which is done by the Labourers is with respect to non-ICI construction, usually residential. Taking the practice evidence as a whole, it appears that the Labourers are regularly engaged in landscaping work which requires concrete forming. However, it also appears that when the work is in connection with the construction of a new structure in the ICI sector, the work has to a significantly greater degree been performed by members of the Carpenters.

56. With respect to the factor of economy and efficiency, the materials and submissions of all the parties was rather sparse. The Labourers assert that the work is of an intermittent nature and therefore it would be more economic and efficient to have it done by members of the Labourers who are on the job performing all aspects of what it terms landscaping construction. The Carpenters assert simply that economy and efficiency dictate the assignment of the work to members of the Carpenters.

57. The applicants did not file any materials with the Board for the purposes of the consultation. In their complaint, which started this proceeding, they support the assignment of work that was made and requested that the Board confirm this assignment. They do not rely (in their com-

plaint) on any arguments regarding economy and efficiency to support this assertion. Nevertheless, at the consultation, they submit that the factor of economy and efficiency is an important one for the determination of these cases.

58. The applicants seek to lead evidence to establish the “commercial realities” that led to the manner in which the work in dispute was contracted. The applicants agree that the work in dispute is sometimes included in the general forming package for the construction of the building, and is sometimes included in a separate package for outside construction. Counsel submitted that it is a question of “convenience” as to which prevails on a particular project, and therefore which trade will be employed to do the work. Implicitly, the applicants suggest that they ought to have the discretion to determine in each case whether it is more convenient to sub-contract the work to a contractor who will employ the Labourers, or to a contractor who will employ the Carpenters, or indeed, to have the work performed by their own forces.

59. The only basis for the assertions regarding economy and efficiency by the applicants were the representations of counsel at the consultation. The applicants have chosen not to file any material in support of these assertions, nor set out in written form the specifics of these assertions. Having regard to the Board’s detailed requirements for the filing of any documents and the particularization of any facts on which parties intend to rely in a jurisdiction dispute proceeding, we decline to give much weight to this submission or to hear evidence in support of it.

60. Having regard to the written materials before us and the representations of the parties, we are satisfied that the factor of economy and efficiency favours neither trade clearly in its claim to the work in dispute in these cases.

Decision of the Board

61. Having regard to all of the factors which the Board normally takes into account in the determination of jurisdiction disputes, which include collective bargaining relationships, trade agreements, employer preference, area practice, skills and economy and efficiency, we are satisfied that the Carpenters ought to be assigned the work in dispute.

62. To summarize our findings, we are satisfied that the trade agreement on which the Carpenters rely support its claim to the work in dispute in that the Labourers and the Carpenters have agreed that the carpentry portion of concrete forming work in relation to an ICI project shall be performed exclusively by members of the Carpenters, with specific exceptions which are not applicable here.

63. We have found that other factors such as skills, economy and efficiency and employer preference favour neither trade definitively.

64. We have found that the factor of area practice favours the Carpenters, in that they have been employed on significantly more projects to perform the carpentry portion of concrete forming work in relation to outdoor structures built as part of a project for the erection of a building in the ICI sector.

65. We therefore direct that the work in dispute be assigned to members of the Carpenters.

0185-93-R International Brotherhood of Electrical Workers, Local 353, Applicant v. General Signal Limited, Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Employer employing only full-time employees at time of certification application, but having history of employing students during summer vacation period - Employer having no history of employing part-time students - Union proposing all-employee unit, while employer submitting that students ought to be excluded - Parties disputing effect of section 6(2.1) of the Act - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Rundle* and *K. Davies*.

APPEARANCES: *Bernard Fishbein*, *Graeme Aitken* and *Larry Venning* for the applicant; *David L. Brisbin*, *Neil Jeffrey*, *Geoffrey Bourne* and *David Pinto* for the responding party; *Ken Roach*, *Don Hickey*, *Gary Jones* and *Steve R. Gerber* for the objectors.

DECISION OF THE BOARD; November 12, 1993

1. This is an application for certification. In an earlier decision issued by this panel on June 8, 1993 [now reported at [1993] OLRB Rep. June 509], the Board certified the applicant on an interim basis pending our decision with respect to the parties' dispute concerning the bargaining unit description. The following is our decision with respect to that matter.
2. The applicant is engaged in the installation, service, maintenance and verification of fire protection systems, emergency lighting systems and life safety systems. On the date of application, April 19, 1993, approximately 46 persons were employed in the proposed bargaining unit working at or out of the employer's premises in Mississauga. At the time, all of the employees in the proposed bargaining unit were full-time employees. There were no part-time employees working for the employer on the date of the application nor has the employer employed part-time employees in the past. However, the employer has for many years employed students during the summer vacations, although given the date of the application, there were no summer student employees at work at the time. The students, when employed, work on a full-time basis, i.e., for more than twenty-four hours per week. No evidence was led with respect to the number of students normally employed during the course of the summer, nor was there any indication of the nature of the relationship of the such students to the remainder of the workforce.
3. The parties are agreed that, subject to other exclusions which are not germane to the issue before us, a unit including both full-time and part-time employees is appropriate in light of the provisions of the recently amended section 6 (2.1) of the Act. However, they disagree as to whether summer students should be included in the unit, and in particular, they disagree on what effect, if any, section 6 (2.1) should have with respect to the Board's approach to determination of the appropriateness of the bargaining unit in these circumstances.
4. Section 6(2.1) reads as follows:

A bargaining unit consisting of full-time employees and part-time employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.
5. Both parties, of course, were of the view that this amendment had the effect of modifying the Board's policy respecting the appropriateness of separate full-time and part-time units. However, the employer took the position that, in the face of the long-standing Board policy of treating part-time and summer student employees "in tandem", the omission of students from the

effect of the deeming provisions was significant. Mr. Brisbin asked us to draw the inference, on the basis of the *exclusio unius* maxim, that the Legislature intended the deeming provisions to extend only to part-time employees, and not to summer students. Given the Board's well-known practice of treating the two groups together, he argued, the Legislature would have included summer students in a unit to be deemed appropriate had that been its intention. In this respect, it was argued that it is not surprising that no such inclusion was made, given the divergent interests of the two groups, and the dissimilar relationships to employers that the two groups develop. Rather than relying upon a deeming provision, he submitted, it would be incumbent upon the trade union to organize the students themselves.

6. By contrast, counsel for the trade union asked us to draw the opposite inference: by making no reference to summer students in the amendment, the Legislature intended no alteration to the Board's usual treatment of the two groups in tandem. He stressed that there would have to be specific language to displace such a well-established policy and that in its absence, he asked us to draw the inference that there was no intention on the part of the Legislature to depart from the Board's established practice. In short, it was the trade union's position that the legislation has the effect of according "tandem treatment" to part-time and summer student employees. In this respect, counsel directed us to a number of Board decisions in which the tandem policy was articulated, in particular, *Plummer Memorial Hospital*, [1979] OLRB Rep. May 433, *Inter-City Bandag (Ontario) Limited*, [1980] OLRB Rep. March 324, *Elizabeth Fry Society*, [1985] OLRB Rep. July 1026, and *Toronto General Hospital*, [1986] OLRB Rep. April 566. Although counsel conceded that the Board's assessments of the interests of part-time employees relative to those of full-time employees may require reassessment in light of the new deeming provisions, he maintained that the factors considered in these decisions, particularly with respect to the non-viability of summer student units, remained decisive and that the Board should continue to treat the two groups together.

7. Upon a careful examination of the Board's practice with respect to summer students we are not satisfied that the tandem treatment of part-time and summer student employees is so unequivocal or invariable a policy as to warrant the inferences either of the parties request the Board to draw. This is especially the case where, as in the present circumstances, the employer has a practice of employing summer students, but no such practice with respect to part-time employees. Indeed, as may be seen below, in the absence of agreement, the Board's usual approach prior to the amendment in such circumstances was to include the part-time employees but to exclude the summer students from the bargaining unit.

8. There is no doubt that it has been the Board's general preference to link summer students with part-time employees in certification proceedings. The Board has expressed the concern that, were summer students to organize and be grouped in their own bargaining unit, the lack of continuity in the employment relationship inherent in their status would prevent them from constituting a viable bargaining unit for purposes of collective bargaining. (*Elizabeth Fry Society, supra.*) In addition, the Board has indicated that students-only bargaining units, were they to be certified, would likely lead to excessive fragmentation. These concerns are set out very clearly in *Plummer Memorial Hospital, supra*, at para. 2:

... Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application is filed for part-time employees it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit. The Board's practice is predicated on the belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation.

(See also the *Regional Municipality of Peel*, [1979] OLRB Rep. Dec. 1285 at paragraph 4.) In light of these concerns the Board has been reluctant to create circumstances where summer students will be required to organize and to bargain alone. Accordingly, upon application for certification for a part-time unit, the Board has normally included both categories in that unit, even if no summer students are present. (*St. Raphael's Nursing Homes Ltd. (Kitchener)*, [1977] OLRB Rep. Sept. 580.)

9. Nevertheless, the tandem policy is by no means invariable and exceptions have been made by the Board in circumstances that include the present one (i.e., where there is no history of part-time employees, a history of summer students, and no agreement between the parties as to their inclusion). Thus, where the parties have agreed upon the part-time/student issue, whether it be to combine or to sever the two groups, and whatever the employment history may have been, it has been the Board's practice, in the absence of special circumstances, to accept that agreement. However, in an application for a full-time unit in circumstances where the employer had established a practice of employing one, but not both of the groups, upon request of one of the parties the Board has normally excluded from the bargaining unit the group present at the workplace, but not the group that was absent. The leading decision in which the policy is most clearly articulated is *Inter-City Bandag, supra*:

...

10. Where there is a history of hiring only one or the other of the two groups, the Board will tend, in the absence of agreement by the parties, to exclude the "existent", but not the "non-existent" group from a full-time unit. Where, however, a full-time unit excludes part-time employees and students, and an application is made for the part-time unit, the Board (again, in the absence of agreement by the parties) will tend to keep the two categories combined, even though only one "exists", in order to avoid undue fragmentation.

11. Similarly, where both groups exist and there is no agreement between the parties, the Board will likely treat the two groups in tandem, having regard to the community of interest that often exists between the two, as well as the usual concern over fragmentation.

10. In *Inter-City Bandag, supra*, the rationale for the exceptions to treating part-time employees and summer students in tandem was spelled out. The Board reviewed a number of previous decisions in which it was held that, notwithstanding the agreements of the parties to exclude only the summer students, both part-time and summer students should be excluded from the unit in circumstances where, as in the present case, there was no history of part-time workers. (*Plummer, supra*; *Regional Municipality of Peel*, Board File No. 0919-79-R; *Dominion Steel Export Co. Ltd.*, [1979] OLRB Rep. Oct. 953; *Bonvil Limited*, Board File No. 1052-79-R). In *Inter-City Bandag*, the Board explicitly rejected such an approach, noting that the policy factors militating in favour of tandem treatment should not override the long-standing Board concerns regarding the exclusion of non-existent groups, especially in circumstances where to do so would override the agreement of the parties. (*Inter-City Bandag, supra*, at paragraph 9.) Accordingly, since that time the Board has been reluctant to apply the tandem policy "rigidly" in circumstances in which the addressing of the concerns of the summer students would entail the exclusion of a non-existent part-time group.

11. As can be seen, this aspect of the Board's policy was formulated in a context in which it was open to parties to exclude part-time employees from the full-time bargaining unit. More significantly, the practice was developed within a broader policy background in which separate full-time and part-time units were seen as appropriate. The statute has now significantly altered that context. Although the precise scope of section 6(2.1) has yet to be determined by the Board, it is clear that the provision would prevent an employer from seeking the exclusion of a "non-existent" part-

time complement in circumstances where the trade union applied for both full-time and part-time employees. More generally, the provision can be seen as a legislative endorsement, albeit a limited one, of the desirability of "mixed" bargaining units. It would appear, then, that the concerns that caused the Board to limit the application of the tandem treatment policy in *Inter-City Bandag* are no longer extant in circumstances in which a bargaining unit of both full-time and part-time employees is deemed appropriate. Indeed, the factors relating to difficulty of organization, viability, and fragmentation are, if anything, highlighted in such circumstances. Accordingly, we have considerable doubt as to whether this aspect of the policy can sustain its relevance in the new statutory context.

12. In any event, the Board's general approach to the assessment of appropriateness of bargaining units has developed significantly over the last ten years in a manner that diminishes the role the Board has played in determining the composition and defining the precise parameters of a bargaining unit. Especially as it has been expressed in the *Hospital for Sick Children* decision, [1985] OLRB Rep. Feb. 266, this approach is characterized by less attention being paid to issues related to the "communities of interest" between various groups of employees that had in the past been the basis of its policies. Instead, the Board now concentrates on the broader labour relations suitability of the unit proposed by the trade union. In this regard, the Board's approach recognizes that the range of appropriateness is broad. The Board has made it very clear that it is not interested in defining the best possible unit or the better of two possible units. Rather, the focus of the inquiry is whether the unit advanced by the trade union is a workable arrangement that would permit collective bargaining to proceed in an orderly fashion. Thus, when it inquires into the appropriateness of a bargaining unit, the Board now addresses the following question:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?" (*Hospital for Sick Children*, *supra*, at page 277)

13. This is not to say that the Board's discretion in these matters is unstructured nor that the policies respecting bargaining unit composition no longer provide useful guidance as to the appropriateness of a unit. Rather, it is a matter of a change of emphasis. Particularly in such cases as *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481 and *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 the Board has expressed a decided preference for broader-based bargaining structures that minimize the fragmentation entailed by a multiplicity of bargaining units, and absent such concerns as the difficulty of organization, it is clear that when the applicant's proposed bargaining unit is, in the Board's view, likely to engender such difficulties, the proposed unit will not be accepted. Moreover, this perspective to a considerable extent dovetails with the legislative policy direction emanating from the recent amendments to the Act and more particularly, section 6(2.1) (discussed above) and section 7, which now permits the Board to combine two or more bargaining units consisting of employees of the same employer and represented by the same trade union. In our view, these amendments point in the direction of more inclusive, broadly-based bargaining units that, at the same time, do not adversely affect employees' right to organization and participation in collective bargaining. It is with this legislative purpose in mind, rather than the sometimes dubious conclusions derived from the application of maxims of construction, that the Board proposes to determine whether the bargaining unit proposed by the applicant is appropriate.

14. Bearing the above in mind, therefore, the Board is satisfied that the applicant's proposed unit, comprised of the employer's full-time workforce in addition to summer students constitutes an appropriate unit for purposes of collective bargaining. As indicated, no evidence was led by either party with respect to the nature of the students' employment relationship, the nature of

their work, or what relationship they may have with the remainder of the workforce. The Board was asked, in effect, to make a ruling on the basis of its accumulated collective experience in such matters. In this respect, the Board notes that on numerous occasions parties have agreed to include summer students in bargaining units otherwise comprised of full-time employees and that it is the experience of the Board that these groups can bargain together effectively. In the absence of any evidence to the contrary in this respect, we see no reason why such a unit cannot be considered viable. It is the Board's further observation that with the increasing utilization by employers of a "flexible workforce", involving short-term and otherwise non-permanent employment relationships, the employment circumstances of summer students are no longer anomalous, and that the clear distinction drawn in the policy between summer students and other employees has become increasingly blurred. Indeed, in light of these concerns, there may be reason to doubt that the distinction remains significant for labour relations purposes.

15. Moreover, the employer has not led any evidence that would indicate that labour relations problems of any degree of seriousness would result from the inclusion of the summer students into the bargaining unit, nor has counsel adverted to any such difficulties in his submissions. The Board can see no particular administrative, organizational or other operational difficulties that would arise by grouping these employees together.

16. We therefore find that the applicant has satisfied the test that the Board has established in *Hospital for Sick Children, supra*, and that accordingly, the unit sought by the applicant is appropriate. Therefore, the Board, pursuant to section 6(1) of the Act certifies the applicant as the bargaining agent for:

all employees of General Signal Limited working at or out of the City of Mississauga, in its service division of its Edwards unit, save and except supervisors, persons above the rank of supervisor, and office and sales staff.

Clarity Note: For the purposes of clarity, the parties agree that the bargaining unit does not include employees performing work for the International Division, which is not work for the Ontario market.

17. A certificate will issue to the applicant.

2835-93-M United Steelworkers of America, Applicant v. J.C.V.R. Packaging Inc., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Union claiming that various lay-offs and changes in employee duties constituting unfair labour practices - Union seeking interim relief pending disposition of unfair labour practice complaint - Board satisfied that important labour relations interests, including preserving ability of employees to freely participate in union activities, outweighing temporary disruption of company's affairs caused by interim orders - Employer ordered to reinstate certain employees and to restore duties or hours to others on interim basis until unfair labour practice complaint determined

BEFORE: S. Liang, Vice-Chair.

DECISION OF THE BOARD; November 19, 1993

1. This is an application for interim relief made pursuant to the provisions of section 92.1 of the *Labour Relations Act*.
2. The parties will be referred to in this decision as “the Steelworkers” or “the union” and “the company”.
3. When this matter came before the Board for hearing on November 18, 1993, and after hearing the representations of the parties, the Board made certain rulings and directions which I summarize as follows.
4. At the outset, the Board noted that the company was appearing through its owner Roger Joyal, without legal counsel. I explained the role of the Board, which is an adjudicative body like a court. I indicated that parties appearing at the Board had the right to be represented by legal counsel, or not represented by legal counsel as they wished. However, Board proceedings are legal proceedings to which certain legal rules apply. Persons choosing not to have legal counsel bear the consequences of that decision. The role of the Board is not to advise unrepresented parties, and the responsibility of presenting cases lies with the parties appearing before the Board.
5. I also spent some time at the hearing summarizing the nature of the case before me, and explaining the difference between my task in making a decision on the request for interim relief, and the task of the Board in deciding the merits of the certification application involving these parties (which is also before the Board starting next Monday) and the unfair labour practice complaint.
6. I then ruled that the company would be granted an extension of time until 9:30 a.m. on Friday, November 19, 1993 to file its response to this application. Mr. Joyal had a copy of the Board’s Rules of Procedure and I directed his attention to Rule 89, which sets out the contents of a response to an application for an interim order, stating:

89. ... A completed response must also include:

 - (a) one or more declarations signed by persons with first-hand knowledge, detailing all of the facts upon which the responding party relies, including what harm, if any, will occur if the interim order is granted. Each signed declaration must include the following statement: “This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy”; and
 - (b) complete written representations in support of its position.
7. I explained that the Board does not, in dealing with applications for interim orders, normally hear oral evidence. Instead, the Board reviews the written submissions and statements of facts submitted by the parties. Even where the Board schedules a hearing to receive the oral submissions of the parties, this hearing is not an opportunity to provide the Board with additional facts to those contained in its written materials. Thus, a party must, in filing its response, ensure that it has provided the Board with the details, through written declarations, of all of the facts on which it relies.
8. In the present case, because of the extension of time to the company to file a response, it was not feasible to continue with the hearing on November 18. I ruled that I would not re-schedule this matter for hearing, but would review the materials before me on November 19 to determine whether I could decide the case on the basis of these materials, as contemplated by Rule 93, to which I also directed the parties:

93. Where the Board is satisfied that a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations, the Board may decide an application under section 92.1 of the Act without an oral hearing.

9. I indicated that since this matter might be decided without a hearing, it was up to the company, in filing its response, to ensure that it had submitted all of the facts and all of the argument that it wished to make to the Board on the issues contained in this application.

10. The Board has now received the response of the company and upon my review of the materials before me including the application and accompanying declarations, I am satisfied that I can decide this request for interim relief without a further hearing.

11. Section 92.1(1) of the Act provides:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

12. This is an application made under section 92.1 for certain interim orders (Board File No. 2835-93-M). In another file, Board File No. 2534-93-U, the union has filed a complaint alleging unfair labour practices by the company. It alleges that the company has illegally laid-off some employees, changed the duties or hours of some employees, intimidated employees, and engaged in other anti-union conduct. The complaint of unfair labour practices has been scheduled for hearing starting on November 30, 1993. This application asks the Board for *interim* reinstatement of the laid-off employees, and other interim measures, pending the outcome of that hearing into the complaint.

13. In the Board's previous cases dealing with interim orders, the Board has discussed the place of interim relief in the context of alleged unfair labour practices: see, for example, *810048 Ontario Limited c.o.b. as Loeb Highland*, [1993] OLRB Rep. March 197; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019. The Board has said that interim relief is warranted where it may serve to "neutralize the potential impact of an *alleged* unfair labour practice" (see *Tate Andale Canada Inc.*), preserve the right of the union to a meaningful remedy should the complaint be upheld (see *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242) or preserve a "status quo" in order to provide some stability within which litigation over labour relations disputes may proceed (see *New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited*, [1993] OLRB Rep. Aug. 783).

14. Within this context, the Board's determinations under section 92.1 involve applying a two-step inquiry. Firstly, the Board assesses, on the basis of the materials before it, whether there is any apparent merit to the complaint which forms the basis for the request for interim relief. In this assessment, the Board in no way makes a finding or determination as to the actual merits of the complaint - that is for the panel which hears the complaint to decide. Rather, the Board takes a preliminary view of the matter in order to assess whether, assuming that the facts relied upon by the applicant are true, the applicant has shown an arguable case for the relief sought in the main complaint.

15. We are satisfied that the applicant has shown an arguable case that the company has laid off Jagdev Thind, Zulfigar Bhatti, Gurpreet Singh, Kulwant Singh and Gurdeep Singh because of suspected union activity or support, has changed the duties of Zulfigar Bhatti because of suspected union activity, has changed the duties and reduced the hours of work of Jasvir Badwal because of suspected union activity, has interfered with the union organizing drive, and interfered

with employees' rights to participate in the union or choose to support the union without intimidation or coercion (including compelling employees to sign forms indicating opposition to the union).

16. The company has filed lengthy submissions in support of its position that the actions taken against specific employees were justified and taken without any anti-union intent. Clearly, there are significant issues in dispute with respect to the merits of the unfair labour practice allegations, and the company will have the opportunity to prove its position when these allegations are heard on their merits. For the purposes of these interim orders, however, as I have stated, I am satisfied that the applicant has shown an arguable case.

17. The second assessment that I must make is whether assuming the applicant has shown an arguable case, the harm in *not* granting interim relief outweighs the harm of granting it, such that it would be more consistent with the purposes of the Act, the exercise of the rights under the Act, and the purposes of interim relief, to grant the orders requested.

18. The union's materials detail the type of harm which they say has been occasioned by these alleged unfair labour practices.

19. The materials filed by the the company do not address directly the harm that would be caused by the granting of the interim orders requested by the applicant. However, the company makes submissions to the effect that it is in financial difficulty, that Mr. Joyal is in a position of having to make difficult managerial decisions to ensure the continued financial survival of the company, and that such decisions necessarily take into account the interests of the company in having a quality workforce.

20. The Board is not unappreciative of Mr. Joyal's concerns, and to the extent that my interim orders have an impact on his unimpeded direction of the company, I appreciate that they cause some disruption to his enterprise. On the other hand, I am satisfied that the important labour relations interests of addressing the potential impact of the alleged unfair labour practices, to preserve the ability of employees to freely participate in the union's activities and exercise their choice to participate or to choose the union as their representative, outweighs the temporary disruption to the company's affairs caused by these interim orders. I am therefore satisfied that the balance of harm favours the granting of interim relief.

21. In assessing the specific orders which the union has requested, I have considered that some of the actions complained of ceased more than a month ago (ie. the different break times given to certain employees), some were the subject of prior Minutes of Settlement resulting in reinstatement, and some can be addressed in a notice which is more generally worded than that sought by the union. In the result, I make the following interim orders, which are in effect until the disposition or resolution of the unfair labour practice complaint in Board File No. 2534-93-U:

(a) an order reinstating Jagdev Thind, Zulfigar Bhatti, Gurpreet Singh, Kulwant Singh, and Gurdeep Singh to the positions they held prior to the layoffs on November 1, 1993 and in the case of Zulfigar Bhatti, to the duties and responsibilities that he held prior to September 6, 1993;

(b) an order that Jasvir Badwal be reinstated to the duties he held and the average number of hours worked prior to October 5, 1993;

(c) an order that the Board Notice as set out in Appendix A hereto shall be translated into Punjabi and shall be posted in both Punjabi and English in conspicuous places in the workplace.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THE BOARD HAS ORDERED J.C.V.R. PACKAGING INC. TO REINSTATE JADGEY THIND, ZULFIGAR BHATTI, GURPREET SINGH, KULWANT SINGH AND GURDEEP SINGH UNTIL THE BOARD DECIDES WHETHER THEIR LAYOFFS WERE LEGITIMATE. THE BOARD HAS ALSO ORDERED THE COMPANY TO GIVE BACK TO ZULFIGAR BHATTI AND JASVIR BADWAL CERTAIN DUTIES OR HOURS, UNTIL THE BOARD DECIDES WHETHER THESE CHANGES WERE LEGITIMATE.

A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON NOVEMBER 30, 1993. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY THE ABOVE EMPLOYEES WERE LAID OFF OR HAD THEIR DUTIES OR HOURS CHANGED.

IF THE BOARD IN THE END DECIDES THAT THE REASONS FOR THE LAY-OFFS OR CHANGES HAD NOTHING TO DO WITH THE UNION, THEN THE TEMPORARY REINSTATEMENT ORDER AND OTHER ORDERS WILL BE REVOKED AND THE COMPANY WILL NO LONGER HAVE TO EMPLOY THEM OR GIVE THEM THE ADDITIONAL HOURS OR DUTIES.

IF THE BOARD IN THE END DECIDES THAT THE LAY-OFFS OR CHANGES OCCURRED BECAUSE THE EMPLOYEE SUPPORTED THE UNION, THE BOARD MAY CONFIRM THE TEMPORARY ORDERS.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO, A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BY AN EMPLOYER OR A TRADE UNION OR A REPRESENTATIVE OF AN EMPLOYER OR A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT INCLUDING ATTENDING A HEARING AS A WITNESS OR A POTENTIAL WITNESS.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IF AN EMPLOYEE IS PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING FOR EXERCISING ANY OF THESE RIGHTS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 19TH day of NOVEMBER, 1993.

1698-93-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Landawn Shopping Centres Limited, Responding Party

Practice and Procedure - Stay - Unfair Labour Practice - Subsequent to union's unfair labour practice complaint being filed, employer obtaining *ex parte* court order under *Companies' Creditors' Arrangement Act* staying proceedings before the Board - Registrar directed to set matter down for hearing to receive parties' submissions on Board's jurisdiction to hear and decide complaint in light of court's order

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *P. V. Grasso*.

DECISION OF THE BOARD; November 4, 1993

1. This is an unfair labour practice complaint made under section 91 of the *Labour Relations Act*, and filed with the Board on August 25, 1993.

* * *

2. On July 12, 1993 the union was certified as the exclusive bargaining agent for the employer's security guards. The union alleges that on August 6, 1993 the employer made threatening statements to employees and, the following day, penalized union supporters by reducing their hours of work. The union contends that these employer actions violated sections 65, 67, 71 and 81 of the Act, which read, in part, as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

[emphasis added]

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

[emphasis added]

* * *

71. *No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.*

[emphasis added]

* * *

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

• • •

Since the violations of the Act are said to be continuing, the union, on behalf of its members, seeks a "cease and desist" order, together with other related redress, including a posting to blunt the impact of what the union claims are illegal acts.

3. On September 15, 1993 the employer filed its Reply to the complaint. The employer denied the union's allegations. The employer asserted that there were economic reasons for the actions complained of, and that the complaint should be dismissed.

4. On the same day, September 15, 1993, the employer obtained a Court Order under the *Companies' Creditors' Arrangement Act*, staying proceedings, *inter alia*, before the Labour Relations Board under the *Labour Relations Act*. This Order was obtained *ex parte* - that is, without notice to the union, the employees, or the Board. Accordingly, neither the union, the employees, or the Board have had the opportunity to consider the context in which the Order was given, or to consider the relationship between the rights of creditors and debtors under the "federal" *Companies' Creditors' Arrangement Act*, and the rights of employees under provincial legislation. That relationship is not at all obvious, because the focus of provincial legislation is not the financial claims which an employee may have against his employer or the priority of those claims in relation to other claimants, but rather the rights, treatment, and well-being of employees on the job.

5. In Ontario, employees cannot be discharged or penalized because they are black, or because they are women, or because they are Jews, or because they are trade union supporters. Employees are protected from this form of discrimination. Employees cannot be exposed to unsafe

working conditions, or penalized for pursuing health and safety issues. Employees are protected from this threat to their personal safety and security on the job. Employees also have a protected right to collective bargaining and freedom of association.

6. None of these rights has anything to do (directly) with wage claims or debts. Nor are they rooted in contract law. They are guaranteed by a network of statutes (*The Labour Relations Act*, *The Human Rights Code*, *The Occupational Health and Safety Act*, etc.); and in each statute the Legislature has provided specific enforcement mechanisms so that a breach of these statutory rights can be considered, restrained, and redressed. Some of these mechanisms are quasi-judicial in nature, such as a proceeding before this Board. Others are more administrative, such as the power of a safety inspector to direct an employer to rectify unsafe working conditions. And in some cases, such as the *Labour Relations Act*, the Legislature has given jurisdiction over such matters to specialized tribunals and has either limited judicial review or prescribed the manner in which it must be sought.

7. It is not at all clear how this web of statutory protections under provincial legislation relates to the rights of creditors under the federal *C.C.A.A.*, or the extent to which, on the *ex parte* motion of a debtor-employer, the rights of employees are subordinated to the rights of lenders. It is not clear whether the employer is now free to carry on business without regard to those statutory rights, protections, and remedies, or is relieved of responsibility for contravening the legislation. Moreover, section 110 of the *Labour Relations Act* reads as follows:

110. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Section 110 would appear to limit judicial intervention, at the very least until the *Judicial Review Procedures Act* has been complied with - unless, of course, some other provincial statute modifies section 110, or the provincial statutes are ousted by paramount federal legislation.

8. We also note, parenthetically, that Price Waterhouse Limited has been appointed as "monitor" to conduct the business and affairs of the employer, and that Item 19 of the Order reads as follows:

19. THIS COURT ORDERS that the appointment of the Monitor shall not constitute the Monitor to be an employer or a successor employer within the meaning of any legislation governing employment or labour standards or any other statute, regulation or rule of law or equity for any purpose whatsoever and, further, that the Monitor shall be deemed not to be in possession, control or management of the Property of the Applicants or of their business and affairs whether pursuant to any legislation enacted for the protection of the environment such as the Environmental Protection Act (Ontario), The Canadian Environmental Protection Act, The Ontario Water Resources Act, The Occupational Health and Safety Act, The Regulations thereunder or any other statute, regulation or rule of law or equity for any purpose whatsoever.

This aspect of the Order seems to exempt the "monitor" running the business, from the application of a variety of provincial statutes, including those prohibiting business activities harmful to the environment, and the main statute protecting the health and safety of employees on the job. It also provides that what might well be a "successorship" under section 64 of the *Labour Relations Act* is "deemed" not to be so. Yet sections 64 and 108(1) of the Act provide, in part:

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

• • •

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

* * *

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

9. It will be seen, therefore, that the Order is quite comprehensive in its scope, and far-reaching in its potential impact on a variety of statutory rights. It seems to hold, in effect, that a federal statute dealing with the financial interests of debtors and creditors negates or suspends the rights and protections of employees found in these various provincial statutes.

10. As we understand it, the employer's position is that its *ex parte* Order has either temporarily suspended the application of this provincial legislation or (what arguably amounts to the same thing), prevents persons from seeking relief for any past or ongoing infringement of those statutory rights. In his letter of September 20, 1993 counsel for the employer requests that the Board suspend or stay this proceeding pending further order of the Court.

11. However, we do not think that we should adjourn, or schedule a hearing on the merits of the complaint, or indeed take *any* step whatsoever without giving the other parties in this matter

an opportunity to be heard. The Board does not ordinarily entertain *ex parte* applications; and if the potential effect of the above-mentioned Order is to relieve the employer (and perhaps Price Waterhouse) of any continuing obligation to comply with these various provincial statutes, including the *Labour Relations Act*, we think that the parties whose statutory rights may be suspended should have an opportunity to address that question. Similarly, since the rights of lenders and borrowers is not the Board's usual focus of concern (or area of expertise), it would be helpful if counsel for the employer (and/or Price Waterhouse) addressed the legal framework within which these various legal rights are to be harmonized.

12. The Registrar is therefore directed to set this matter down for hearing for the purpose of receiving the parties' submissions on the jurisdictional basis and effect of the above-mentioned Order, and, as well, on the Board's jurisdiction, if any, to hear and decide this complaint in light of that Order.

13. Since this issue may involve the potential clash of federal and provincial statutes, notice of this proceeding and a copy of this decision will be given to the Attorney General of Canada and the Attorney General of Ontario.

0340-93-R; United Steelworkers of America, Applicant v. Barnes Security Services Limited c.o.b. as Metropol Security Services, Responding Party

Certification - Representation Vote - Security Guards - Union applying to be certified for unit of 1100 guards working at 200 sites within 4 separate municipal regions - Board directing representation vote in agreed-upon voting constituency - Union requesting that employer disclose to it addresses of employees on voters' list - Board directing employer to produce labels containing names and addresses of persons on voters' list and to allow union representatives to attend employer's office with sealed envelopes to be labelled and mailed by representatives of union and employer together - Board directing that all reasonable costs associated with mailing to be borne by union

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

APPEARANCES: *Robert Healey*, *Brad James* and *Omero Landi* for the applicant; *Brett Christen*, *Frank Charron* and *Patrick Bishop* for the responding party.

DECISION OF THE BOARD; November 9, 1993

1. This is an application for certification filed pursuant to the provisions of the *Labour Relations Act* ("the Act"). By letter dated October 1, 1993 the applicant requested leave of the Board to amend its application for certification such that a representation vote be taken in this matter.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that:

all employees of Barnes Security Services Ltd. in its Metropol Security Division in the Municipality of Metropolitan Toronto, the Regional Municipality of Halton and the Regional Municipality of York.

pality of York, save and except Operations Manager and persons above the rank of Operations Manager, Account Executive, dispatchers, office, clerical and sales staff and persons for whom any trade union held bargaining rights as of April 30, 1993;

and pending resolution of the dispute excluding as well site supervisors, shift supervisors, field supervisors, and mobile patrol supervisors,

constitute a unit of employees of the responding party appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that not less than forty per cent of the employees of the responding party in the bargaining unit on April 30, 1993, the certification application date, had applied to become members of the applicant on or before that date.

5. Prior to the hearing in this matter the parties met with a Labour Relations Officer and were able to agree upon a number of matters. Having regard to the agreement of the parties the Board directs that a representation vote be taken of the employees of the responding party in the agreed upon voting constituency. At the Labour Relation Officer's meeting the parties were also able to agree upon the voters' list and were also able to agree upon the arrangements made for the actual taking of the vote. The Board hereby directs that the vote be taken in the manner agreed upon by the parties. In conducting the vote, voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

6. There were only two issues upon which the parties were not able to agree. The parties reached only partial agreement with respect to the description of the bargaining unit. The parties disagreed as to whether site supervisors, shift supervisors, field supervisors and mobile patrol supervisors were included or excluded from their agreed upon bargaining unit. The respondent asserts persons in these positions exercise managerial functions and are therefore properly excluded from the bargaining unit. The applicant takes the contrary position. The Board hereby appoints a Labour Relations Officer (to be assigned by the Manager of Field Services) who is authorized to inquire into the issues in dispute and the duties and responsibilities of the employees whose status is in dispute and report to the Board.

7. The only other issue upon which the parties did not agree involves the applicant's request that the responding party disclose to it the addresses of the employees on the voters' list. We heard the submissions of the parties with respect to that issue on November 8, 1993.

8. It is appropriate at this point to note the unique facts and circumstances surrounding the applicant's request in this application for certification. The bargaining unit agreed upon is essentially a unit of security guards. The agreed upon bargaining unit description refers to a geographic area comprising four (4) separate municipal regions namely, the Municipality of Metropolitan Toronto, the Regional Municipality of Peel, the Regional Municipality of Halton and the Regional Municipality of York. It is not disputed that the unit includes in excess of 1100 employees working at approximately 200 different sites throughout that geographic area. The responding party indicated (and the trade union neither disputed nor was able to confirm) that approximately seventy-five per cent (75%) of its employees "owned" sites ie. work regularly at the same location(s), while the remaining twenty-five per cent (25%) of its workforce did not.

9. With respect to the conduct of the vote the parties have already agreed that the trade union receive a copy of the voters' list, have agreed that individual notices of the taking of the vote be sent to each employee (with the responding party providing adhesive labels with the names and addresses of the employees for that purpose) and have agreed to a single polling location within each municipality rather than individual polls at the various sites at which the employees are

employed. The parties have further agreed that those polls will remain open for approximately four hours a day for two days during the week in which the vote will take place.

10. We do not purpose to outline in their entirety the very able submissions of both counsel. A brief summary of their positions is sufficient.

11. Counsel for the trade union asserts that the addresses are necessary so that the trade union can communicate with the electorate. The workforce here is composed of widely dispersed individuals. The trade union is not aware of all the various locations at which the employees work. Without the addresses of the individuals on the voters' list the trade union will, in effect, be denied the opportunity to communicate with employees. The employees in turn will be denied the opportunity to make an informed choice. The right to choose a bargaining agent is a right protected by the Act and that right to choose must necessarily include the right to make an informed choice. Counsel also addressed the issues of the individual's right to privacy, the employer's interest in maintaining confidential this information, and the possibility of misuse of the addresses.

12. Counsel for the responding party employer asserted that the Board did not have the jurisdiction to make the direction sought by the trade union. Counsel argued that the Act contained no provisions which obliged the responding party to provide such information to the trade union. It was counsel's position that in the absence of a specific statutory provision the Board does not have the power to make the order requested. In this regard counsel submitted that section 105(2)(f) did not apply. Counsel noted that it was significant that the Legislature had not enacted any specific provisions which provide the Board with the authority to direct the disclosure of addresses when the recent amendments (Bill 40) were passed notwithstanding the debate of the various policy considerations with respect to this issue. In addition counsel submitted that the employer had a legitimate interest in maintaining the confidentiality of this information. The guard or security services protection industry is a highly competitive one. Contracts for security or guard services are susceptible to change by the purchaser of such services. The employer therefore has an interest in protecting the confidentiality of the names and addresses of the employees in whom it has invested time and money ie. for training etc. The responding party therefore should not be required to compromise that confidentiality only in order to facilitate the applicant's campaigning prior to the taking of a representation vote.

13. We have carefully considered the submissions of the parties. We have determined that the Board has the jurisdiction to make the direction which the applicant trade union seeks. In particular the Board has that jurisdiction pursuant to section 105(2)(f). The Board has in the past made similar orders in cases involving occasional teachers. *York Board of Education*, [1985] OLRB Rep. May 767, *Scarborough Board of Education*, [1986] OLRB Rep. Mar. 361, see also *Queen's University at Kingston*, [1987] OLRB Rep. June 925.

14. The circumstances of those cases are distinguishable from those before us insofar as the decisions of the Board in each of those instances appear to be predicated on the fact that occasional teachers are dispersed and not attached on a regular or consistent basis to a particular work location. In the present circumstances the vast majority of the employees have some regular and consistent attachment to a particular work location. In this regard we note parenthetically that the difficulty of communicating with employees may in part be due to the agreement of the parties with respect to a bargaining unit which encompasses a large geographic are.

15. We have determined that in this instance an appropriate balance can be struck when considering the interest of the applicant trade union, the responding party employer, and the employees. We concur with the observations of the Board in *York Board of Education*, *supra*, at part IX, that it is important that the electorate be an informed electorate and that an opportunity

for *both* parties to communicate with employees is necessary to permit the employees to properly assess the consequences of choosing to vote for or against representation by the applicant. The interest of the trade union in communicating with the electorate is self evident. We accept however that there are other policy concerns including the right to individual privacy and the confidential nature of this information from the employer's perspective which must also be considered.

16. In these circumstances we direct that the employer shall forthwith cause to be produced labels containing the names and addresses of each of the persons on the voters' list. A trade union representative may attend at the offices of the responding party with sealed envelopes containing such information as the applicant wishes to communicate to the employees on the voters' list. Representatives of the employer and the applicant shall together label the sealed envelopes and arrange for the mailing or distribution of such information. All reasonable costs associated with the mailing of such information shall be borne by the applicant trade union.

17. The Board will remain seized of this matter in the event the parties encounter any difficulty with the implementation of this direction.

2586-93-R; 2663-93-U Graphic Communications International Union, Local N-1, Applicant v. **Michelin Tires (Canada) Ltd.**, Responding Party v. Group of Employees, Objectors; Graphic Communications International Union, Local N-1, Applicant v. Michelin Tires (Canada) Ltd. and Ray Krawchuk, Responding Parties

Bargaining Unit - Certification - Practice and Procedure - Union amending description of bargaining unit applied for 4 days after application date - Union proposing site specific, rather than municipal unit in amended description - Board reprocessing application in accordance with amended description and extending terminal date - Board dismissing objecting employees' application to reconsider decision to reprocess application - Board rejecting objecting employees' position that amendment constituted new application and that new "application date" be assigned to it - Board rejecting objecting employees' submission that Board's Notice to Employees deficient - Board finding union's proposed unit appropriate

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *Mark Wright, George Novak, Beth Horton, and Stuart McLean* for the applicant; *Robert N. Gilmore, George Sutherland, Ray Krawchuk and Jane Richardson* for the responding parties; *C. J. Abbass and Ron M. Smith* for the objectors.

DECISION OF THE BOARD; November 26, 1993

1. Board File No. 2586-93-R is an application for certification. Board File No. 2663-93-U is a related application under section 91 of the *Labour Relations Act* in which the applicant trade union complains that the Act has been breached.
2. The name of the responding employer is amended to "Michelin Tires (Canada) Ltd.".
3. The application for certification was filed on October 25, 1993. Subsequently, by letter

dated and faxed to the Board on October 28, 1993, and subsequently hand delivered to the Board on October 29, 1993, the applicant wrote to the Board that:

"We act for the Graphic Communications International Union, Local N-1 (the "Union"), in the above-noted matter.

The Union wishes to amend the bargaining unit applied for, as set out in paragraph 4 of the Application for Certification. The Union wishes the bargaining unit description to read as follows:

"All employees of the Respondent at its facility at 55 West Drive, Brampton, Ontario, save and except foremen, persons above the rank of foreman, and office staff."

Please do not hesitate to contact me should you have any questions concerning this matter."

The applicant filed its section 91 application on October 29, 1993 under cover of a separate letter dated October 28, 1993 and which reads as follows:

"We act for the Graphic Communications International Union, Local N-1, in the above-noted matter.

Enclosed are seven (7) copies of a Form A-35, Application Under Section 91 of the Act, filed on behalf of our client. We request that this matter be scheduled for hearing by the Board on November 22, 1993 along with the Application for Certification (OLRB File No. 2586-93-R) as both this Application and the Application for Certification concern the same parties and events."

In yet a third letter dated October 28, 1993 the applicant wrote to the Board that:

"As you know, we act for the Graphic Communications International Union, Local N-1, in the above-noted matter.

The Union requests that it be certified under the provisions of section 9.2 of the Act in the event that it is not otherwise entitled to automatic certification as the Employer has violated the Act such that the true wishes of the employees in the bargaining unit cannot be ascertained. In support of this request, the Union relies on the particulars and material facts set out in the attached Schedule "B". This schedule also forms Schedule "B" of an Application Under Section 91 of the Act filed on behalf of the Union this day under separate cover. The Union has requested that the Application Under Section 91 of the Act be heard on November 22, 1993 along with this Application for Certification as these matters concern the same parties and the same events."

4. By endorsement dated October 29, 1993 in Board File No. 2586-93-R, the Board, differently constituted, directed that:

"Having regard to the applicant's request in the letter dated October 28, 1993 to amend the bargaining unit description, the Board hereby directs a reprocessing of the application in accordance with the amended description."

5. At the hearing on November 22, 1993, the group of employees, objectors submitted that the decision of the Board to "reprocess" the application was made without notice to them and that they were therefore denied the opportunity to make representations with respect to the applicant's request, namely that it should be denied. The objectors asserted that the only reason that the applicant sought to amend the bargaining unit description to encompass a smaller group of employees was that it knew that it did not have sufficient support among employees in the larger bargaining unit to succeed in this application for certification. Counsel submitted that the manner in which the Board proceeded gives the appearance of injustice. The responding employer

(“Michelin”) agreed with the objectors that what had occurred did not pass the “smell test”. The applicant submitted that the Board should not reconsider the “reprocessing” decision because it had no effect on any rights of anyone affected by the application.

6. Upon receiving the application for certification on October 25, 1993, the Board processed it in accordance with its usual procedures. Part of this processing involved giving notice of the application to Michelin and causing notice of it to be given to Michelin’s employees in the form of a Form B-4 Notice to Employees of Application for Certification and of Hearing before the Ontario Labour Relations Board to be posted by Michelin in places where it was likely to come to the attention of the employees as affected as follows:

File No. 2586-93-R

Form B-4

**LABOUR RELATIONS ACT
NOTICE TO EMPLOYEES OF APPLICATION FOR
CERTIFICATION
AND OF HEARING
BEFORE THE ONTARIO LABOUR RELATIONS BOARD**

Between:

Graphic Communications International Union Local N-1,

Applicant,

- and -

Michelin Tire Ltd.,

Responding Party.

TO THE EMPLOYEES OF:

Michelin Tire Ltd.

1. The applicant, applied on *OCTOBER 25, 1993* to the Ontario Labour Relations Board for certification as bargaining agent of employees of Michelin Tire Ltd. in the following unit:

“All employees of the Respondent in the city of Brampton, save and except supervision, persons above the rank of supervisor and office staff.”

[sic]

Note: The Board may decide that the appropriate bargaining unit is different from the one proposed by the applicant.

2. The **terminal date** set for this application is NOVEMBER 1, 1993.
3. Any evidence of an employee’s objection to being represented by a trade union (“petition”) or evidence of re-affirmation of a desire to be represented by a trade union must have been filed by the date on which the application was filed, which was OCTOBER 25, 1993. Under s. 8 of the *LRA* the Board cannot consider any petition or re-affirmation evidence filed after that date.
4. If you have already filed a petition or re-affirmation evidence relevant to this application by the application date, and you wish the Board to consider it, you must file with

the Board by NOVEMBER 1, 1993 a written statement which sets out your name(s), address and phone number, the file number at the top of this notice, the names of the union and employer and the date the evidence was filed, if known. You must also appear at the Board hearing in person ... (as per current para. 5).

5. If you wish to participate in these proceedings with respect to an issue *other than* a petition or re-affirmation, you must file with the Board by NOVEMBER 1, 1993 a written statement which sets out your name(s), address and phone number, the file number at the top of this notice, the names of the union and the employer, why you want to participate and what you want to say to the Board. If you file such a statement, that statement may be sent to the other parties in this case, and your name(s) may be disclosed to them.
6. If you do not file a statement as set out in paragraph 4 or 5, or if the Board determines that your statement will not affect the result of the application, the Board may decide the application without further notice to you.
7. If you file a statement as set out in paragraph 4 or 5, an L.R.O. may contact you to discuss the issues in the application. You must also attend the L.R.O. meeting and the hearing, if any, or the Board may decide the application without further notice to you and without considering any document you may have filed.
8. **A meeting with a Labour Relations Officer will take place** in the Board Offices, 3rd Floor, 400 University Avenue, Toronto, Ontario, on **WEDNESDAY, NOVEMBER 17, 1993, at 9:30 A.M. for the purpose of trying to settle all or part of this case if the case is not already settled by that date.**
9. **The hearing of the application will take place** in the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario, on **MONDAY, NOVEMBER 22, 1993, at 9:30 A.M. If the case is not already settled by that date, and it will continue on consecutive days from Monday to Thursday, excluding Fridays and holidays until completed or as the Board otherwise directs.**
10. **THE PURPOSE OF THE HEARING**, if a hearing is held, is to hear the evidence and representations of the parties with respect to this application.

DATED October 25, 1993.

T. A. Inniss

Registrar

Ontario Labour Relations Board

NOTE: All communications should be addressed to:

The Registrar
Ontario Labour Relations Board
4th Floor
400 University Avenue
Toronto, Ontario
M7A 1V4
(416) 326-7500

IMPORTANT NOTE

PLEASE CONSULT THE BOARD'S RULES.

COPIES OF THE BOARD'S RULES MAY BE OBTAINED FROM THE BOARD'S OFFICE LOCATED ON THE 4TH FLOOR AT 400 UNIVERSITY AVENUE, TORONTO, ONTARIO (TEL. (416) 326-7500).

YOU HAVE THE RIGHT TO COMMUNICATE WITH, AND RECEIVE AVAILABLE SERVICES FROM, THE BOARD IN EITHER ENGLISH OR FRENCH.

PLEASE INDICATE WHETHER YOU WILL REQUIRE ANY SPECIFIC SERVICES, INCLUDING TRANSLATION SERVICES FOR WITNESSES, OR SERVICES FOR PERSONS WHO ARE HEARING OR VISION IMPAIRED OR OTHER SERVICES. THE BOARD WILL ATTEMPT TO ACCOMMODATE YOU, BUT MAY NOT BE ABLE TO MEET YOUR SPECIFIC REQUEST(S).

7. Such notices were posted by the employer at each of its Brampton locations on October 27, 1993.

8. Upon receiving the applicant's request to amend the bargaining unit described in its original application, the Board found it appropriate to give notice of the applicant's request to Michelin and the employees. It appears that the Board panel which reviewed the matter considered it appropriate to reprocess the application in its entirety and directed that this be done. This resulted in a new Notice being sent to Michelin, a new Notice to Employees being sent to Michelin for posting (which posting was done at both of its Brampton locations on November 1, 1993), and a new (later) terminal date being fixed for the application. The second Notice to Employees describes the amended bargaining unit being sought by the applicant and identifies the new terminal date. It is otherwise identical to the first Notice to Employees.

9. In effect, all employees of Michelin, including the objectors, received notice of the application for certification, the bargaining unit originally proposed by the applicant, the amended bargaining unit requested by the applicant, that the Board might decide that a bargaining unit other than the one proposed by the applicant is appropriate, what to do and when to do it by if they wish to participate in the proceeding, and the dates of the usual Officer's Meeting and of the Board Hearing with respect to the application for certification. It also requests that they consult the Board's Rules and where these can be obtained. No issues were disposed of by the Board and no rights were determined by the "reprocessing" decision. In effect, it was a decision directing administrative action in order to ensure that everyone was aware of the applicant's request and adjusting the times for dealing with the matter before the Board so that all concerned would have an opportunity to consider whether they wish to participate in the proceeding. Further, "reprocessing" the application did not preclude the objectors or anyone else from making any argument they wished with respect to any matter relevant to or arising out of the application, including any issue regarding the bargaining unit description.

10. Finally, it was not apparent what effect reconsidering the "reprocessing" decision would have had when the matter was raised by the objectors on November 22, 1993. What the Board had directed be done had been done and it was not apparent how it could be undone.

11. In the result, I was satisfied that the objectors' request for reconsideration should be dismissed, and I so ruled, orally.

12. The objectors then submitted that the applicant's request to change the description of its proposed bargaining unit constituted a new application which, having regard to the Board's Rules of Procedure, was made when the hard copy was hand delivered to the Board, not when the letter was faxed to the Board. The objectors submitted that a finding by the Board that October 29, 1993 is the certification application date herein would not be contrary to *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. March 158 (application for judicial review dismissed by the Ontario Court of Justice (Divisional Court), [1993] OLRB Rep. May 471) because the Board would be making a finding of the actual certification application date, not "deeming" some other date to be the certification application date, or determining the applicant's right to certification on a date other than

the certification application date. Counsel argued that it is the trade union applying for certification which has control over the all important certification application date and that having made its application it should be held to it. Counsel submitted that a trade union should not be permitted to amend an application for certification in the manner the applicant seeks to do herein and that if it wishes to make this kind of change it should be required to withdraw the application and file a new one. Accordingly, submitted the objectors, the application as amended should be found by the Board have been made on October 29, 1993, or, in the alternative the Board should not allow the amendment.

13. Michelin had agreed that the amended bargaining unit sought by the applicant is an appropriate one. However, counsel observed that the request and the subsequent "reprocessing" certainly gave the appearance of the new application, particularly in view of Rule 25 of the Board's rules. Counsel submitted that the amendment sought is not a minor matter particularly when its effect gives the appearance of shutting out the group of employees covered by the larger unit that excluded from the smaller one, and also prevents consideration of the petitions filed on October 29, 1993.

14. The applicant relied upon the Board's decisions in *Precision Alarms and Signal Systems Limited*, [1993] OLRB Rep. April 381 and *Hemlo Gold Mines*, *supra*, Rules 8 and 43 of the Board's Rules of Procedure, and section 6 of the *Labour Relations Act*. It submitted that there was no reason to refuse to allow the amendment and that if the Board did so the Board was not precluded from finding a bargaining unit other than the amended one the applicant proposed, including the larger unit it originally proposed, was appropriate.

15. Upon considering the representations of the parties, I ruled, orally, that the certification application date herein is the date on which the original application was made; that is, October 25, 1993. I further ruled that I would allow the amendment sought by the applicant and that I would hear the representations of the parties with respect to whether the amended bargaining unit is a unit of employees appropriate for collective bargaining.

16. The applicant could have withdrawn this application for certification and filed another (as, for example, in *General Signal Limited*, [1993] OLRB Rep. June 509). That is not what it did. Instead, the applicant sought to amend the bargaining unit for which it seeks to be certified herein. There is nothing in the *Labour Relations Act* which precludes this and the Board's Rules contemplate the possibility that applications to the Board may be amended. Further, I agree with the Board's decision in *Precision Alarms*, *supra*, which dealt with circumstances which, if anything, were more compelling than those in this case. In *Precision Alarms*, *supra*, the Board held that converting an application for certification from one which relates to the construction industry, and comes under those provisions of the Act which deal specifically with applications for certification in the construction industry, to one which does not and which resulted in an amendment to the bargaining unit applied for and a reprocessing of the application did not make it a new application or change the certification application date:

4. This application was filed on December 21, 1992. It was originally described as an application pertaining to the construction industry because (it was said) the employer's business involved the installation and maintenance of alarm systems. Subsequently, the union sought to amend the bargaining unit description when the employer took the position (and it became apparent) that it was not a business in the construction industry. As a result of this request, the Board extended the terminal date and directed a re-posting to ensure that any employees potentially affected by this application would have notice. It should be noted, however, that regardless of this dispute about the description of the bargaining unit, it has been clear from the outset that the application relates to employees servicing alarm systems in the London area.

5. The employer contends that the “application date” should not be December 21 when the application was filed, but rather the date on which the union acknowledged that it did not pertain to the construction industry and requested the change in the bargaining unit description so that it conforms to the actual nature of the employer’s business. In effect, the employer urges the Board to treat the situation as if a new application had been made at that time - with the result that the number of employees actively at work on the application date is smaller and the identity of those employees is different than on December 21, 1992 when the application was filed with the Board.

6. In *Gallant Painting*, [1987] OLRB Rep. Mar. 372, the Board held, in part:

2. ... in circumstances where an application for certification has been brought under the construction industry provisions and those provisions have subsequently been found not to be applicable, it has been the Board’s practice to treat the application as though it had been made under the general provisions (see, for example, *J.A. Wilson Display Ltd.*, [1983] OLRB Rep. July 1080; *Township of Loughborough*, [1975] OLRB Rep. Feb. 122). ...

That is what has happened here. There has been no “new” application for certification after December 21, 1992, but rather a refinement of the parties’ positions in an existing application; moreover, the union’s characterization of this proceeding as one to which the construction industry provisions of the Act relate is, at most, a technical error or irregularity. The fact that there was a change in the bargaining unit description to more precisely reflect the nature of the employer’s operations and a consequent new notice to employees and extension of the terminal date, does not alter the fact that the application date was and remains December 21, 1992. Whether or not the Board has jurisdiction to declare the application date to be something else, the Board sees no reason why it should do so here, or depart from the approach enunciated in the cases mentioned above.

17. Further, the Board does not have the discretion to change a certification application date. The application for certification herein, though amended, was made on October 25, 1993. That date is fixed by the conduct of the applicant and cannot be changed by the Board. This may put employees at a relative disadvantage or affect their substantive rights. However, this is the effect of section 8 of the *Labour Relations Act*. The Ontario Court of Justice (Divisional Court) has confirmed that Boards’ conclusion that this is so and that a statutory denial of substantive right by section 8 does not amount to a denial of natural justice (see *Hemlo Globe Mines*, *supra*).

18. Counsel for the objectors then raised a question regarding the sufficiency of the Notice to Employees with respect to those employees who would not be included in the bargaining unit if the Board accepted as appropriate the amended unit proposed by the applicant. I was satisfied that the Board’s Notices sufficiently described the application to all Michelin employees and indicated to them how they can participate in this proceeding such that any reasonable employee would have had adequate information upon which to act or at least attend before the Board in that respect. The employees were advised of when the application was made, the original and amended bargaining unit proposed by the applicant, that the Board could decide that the appropriate bargaining unit is something other than the one proposed by the applicant, of the provisions of section 8 of the *Labour Relations Act*, of what they must do and by when they must do it if they have filed a petition or reaffirmation evidence by the application date, of what and by when they must do if they wish to participate in a proceeding, of what could happen if they did not do so, and of the time, date and place of the Officer’s Meeting and Board Hearing scheduled in the matter. The Board received no communication from any employee who would be excluded from the amended bargaining unit until November 23, 1993 when what can best be described as an untimely petition was delivered to the Board. I saw no reason to think that the Board’s Notices were in any way deficient and I so ruled, orally.

19. I then heard the submissions of the parties with respect to whether the bargaining unit

applied for by the applicant (that is, as amended) is an appropriate one. The objectors submitted that the original larger municipal-wide bargaining unit is the appropriate one for this application. Michelin stuck by its agreement that the amended bargaining unit is appropriate. In considering the representations of the parties, I assumed the various assertions of fact by the objectors with respect to the relationship between Michelin's two plants in Brampton, the terms and conditions of employment of the employees, and the skills and abilities of those employees at the two locations to be true. I also assumed, for purposes of my ruling, that the bargaining unit proposed by the objectors would be the most appropriate one.

20. Upon considering the representations of the parties, and having regard to the Board's approach to bargaining unit issues of this kind since *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, I ruled, again orally, in favour of the applicant (see also, *National Trust*, [1986] OLRB Rep. Feb. 250; [1987] OLRB Rep. Jan. 108; [1988] OLRB Rep. Feb. 168, and the developing line of cases beginning with *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380 most recently reviewed in *Englehart & District Hospital Inc.*, [1993] OLRB Rep. Sept. 827 and *Wingham and District Hospital*, [1993] OLRB Rep. Sept. 914).

21. In the Board's experience in certification proceedings, there will often be a variety of bargaining units of varying degrees of appropriateness which will accommodate the collective bargaining process. While the biggest or "most comprehensive" bargaining unit available may carry with it labour relations advantages, this does not mean that a smaller grouping cannot be found by the Board to be appropriate for collective bargaining for purposes of an application for certification. The *Labour Relations Act* has long given the Board a very broad discretion to "determine the unit of employees that is appropriate for collective bargaining" upon an application for certification being made to the Board. There is nothing in the present legislation which changes this. Accordingly, in an application for certification, the Board's task is not to determine which is the best or most appropriate bargaining unit, but whether the bargaining unit applied for is an appropriate one (and if it is not, what bargaining unit, having regard to the particular application, is).

22. In this application, there was no assertion that the applicant's proposed bargaining unit as amended is not appropriate. It was asserted only that it is not the *most* appropriate one. Further, the employer and the applicant trade union, which are the parties to the collective bargaining relationship and which must function within it, agree that the amended unit is appropriate; that is, they foresee no labour relations problems with it. Finally, though the objectors do not agree, they would like the larger unit they proposed because, as counsel candidly conceded in argument, what they really want is a representation vote and a finding in their favour on the bargaining unit issue would give them one.

23. In the result, I was satisfied that the amended bargaining unit proposed by the applicant is an appropriate one and I found that:

all employees of Michelin Tires (Canada) Ltd. at its facility at 55 West Drive, Brampton, save and except foremen and persons above the rank of foreman and office staff

constitute a unit of employees appropriate for collective bargaining.

24. The parties then addressed certain membership evidence issues. Before I ruled on those issues, the parties entered into and filed with the Board a written agreement, dated November 24, 1993, as follows:

File #2586-93-R 2663-93-U

Between:

Graphic Communications International Union Local N-1

Applicant

- and -

Michelin Tire Ltd.

Responding Party
(Employer)

- and -

Group of Employees

Responding Party
(Objectors)

Agreement of the Parties

1. The parties agree that the bargaining unit and voting constituency will be described as follows:

"All employees of Michelin Tires (Canada) Ltd. at its facility 55 West Drive, Brampton save and except foremen and persons above the rank of foreman and office staff."
2. The parties further agree that the Board shall order a representation vote as of the date of this agreement.
3. A list of employee for the purpose of the vote is attached to this agreement.
4. Vote arrangements are as follows:

Date of vote	- December 9, 1993
Alternate date	- December 10, 1993
Location of the Poll	- Cafeteria
Hours of the Poll	- 2:30 pm to 3:30 pm
# of Notices	- 3
Form of the Ballot	- one way (yes or no)

Scrutineers at the Poll

For the Applicant	- George Novak
For the Employer	- Ray Krawchuk
For the Group of Employees	- Ron Smith

Agents at Count

For the Applicant	- George Novak
For the Employer	- Ray Krawchuk
For the Group of Employees	- Ron Smith

Contact person at the vote location - Ray Krawchuk (416) 451-2669

5. The applicant withdraws its challenge to the inclusion of Wayne Hogan #17 on Schedule A in the bargaining unit.
6. The applicant hereby requests leave of the Board to withdraw its application pursuant to section 91, Board file #2663-93-U.
7. The applicant agrees that it is estopped from filing any further actions and or complaints based upon the particulars set out in Board file #2663-93-U.
8. The parties agree that the attached "Notice to Employees" advising the employees of the informal meetings will be posted immediately by the employer.
9. The applicant withdraws its request for certification pursuant to section 9.2 of the Act.

Dated at Toronto this 24th day of November, 1993.

"George Novak"

For the Applicant
GEORGE NOVAK

"Robert N. Gilmore"

For the Responding Party
(Employer)
ROBERT N. GILMORE

"RON M. SMITH"

For the Responding Party
(Group of Employees)

[sic]

ONTARIO LABOUR RELATIONS BOARD

NOTICE TO EMPLOYEES

PLEASE BE ADVISED INFORMAL MEETINGS CONCERNING THE REPRESENTATION VOTE SCHEDULED BY THE ONTARIO LABOUR RELATIONS BOARD, TO BE HELD ON DECEMBER 9, 1993, WILL TAKE PLACE IN THE COMPANY'S CAFETERIA BETWEEN 2:30 P.M. AND 3:30 P.M. ON THE FOLLOWING DAYS:

1. DECEMBER 6, 1993 - GROUP OF OBJECTING EMPLOYEES
2. DECEMBER 7, 1993 - REPRESENTATIVES OF THE UNION
3. DECEMBER 8, 1993 - REPRESENTATIVES OF THE COMPANY

EMPLOYEES ARE FREE TO ATTEND OR NOT TO ATTEND ANY OF THESE MEETINGS. ATTENDANCE AT ANY OF THESE MEETINGS WILL NOT RESULT IN THE LOSS OF ANY PAY.

DATED this 24th day of NOVEMBER, 1993.

A voters list was attached as an appendix to the above agreement but is not reproduced here.

25. I can see no reason why this agreement of the parties should not be accepted. This agreement also eliminates the need to rule on the membership evidence issues.

26. Having regard to the agreement of the parties as aforesaid, the materials filed, and the Board's rulings as aforesaid:

- (a) The application in Board File No. 2663-93-U is withdrawn with leave of the Board;

- (b) The application herein under section 9.2 of the *Labour Relations Act* is withdrawn with leave of the Board; and
 - (c) The Board directs that a representation vote be taken in the voting constituency agreed to by the parties and in accordance with the agreement and arrangements made between them in that respect.
-

3427-92-JD International Brotherhood of Electrical Workers, Local Union 1788, Applicant v. **Ontario Hydro** and Canadian Union of Public Employees, Local 1000, Responding Parties

Construction Industry - Jurisdictional Dispute - CUPE and IBEW disputing work assignment involving installation of fibre optic and twisted pair copper cable at nuclear generating station - Board considering the competing collective agreements, skill and ability of the workforces, employer preference and employer's past practice within the province - Board determining that work should be assigned to IBEW

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*

APPEARANCES: *L. A. Richmond, J. Sprackett* and *H. Bartlett* for Electrical Workers Local Union 1788; *M. Patrick Moran, Vello Medri, Tim Liznick, Pierre Tremblay* and *Jennifer Wooton Regan* for Ontario Hydro; *R. Ross Wells, Peter Falconer, John Murphy, Ron Ford, Don McKinnon* and *Peter Kelly* for C.U.P.E. Local 1000.

DECISION OF THE BOARD; November 12, 1993

1. This is a jurisdictional complaint, filed in February 1993, pursuant to the recently amended section 93 of the *Labour Relations Act* ("the Act"). The Board held several days of consultation with the parties prior to issuing a bottom line oral decision. The bottom line oral decision was issued in written form on May 25, 1993. On August 3, 1993, the panel received a request from the complainant in this matter, the International Brotherhood of Electrical Workers, Local Union 1788 ("Local 1788"), to issue full reasons for the decision.

2. The work in dispute is the installation of a local area network ("LAN") computer system at the Pickering Nuclear Generating Station ("PNGS") of Ontario Hydro at Pickering, Ontario, more particularly described below:

- a. The terminating point for fibre optic cable distribution will be the "Network Operating Centre" ("NOC") to be located in the Administration Building in the vicinity of the Data Centre. Twisted pair copper cable will be run from the NOC to a wiring closet on each floor of the Administration Building;
- b. Fibre optic cable will be run from the NOC to a wiring closet in the Production Maintenance Area;
- c. Fibre optic cable will be run from the Production Maintenance Area wiring closet to a wiring closet in the Control Room of Generating Station "A".

- d. Fibre optic cable will be run from the Production Maintenance Area wiring closet to a wiring closet in the control Room of Generating Station "B";
- e. Fibre optic cable will be run from the Production Maintenance Area wiring closet to a wiring closet on each floor of the Service Wing;
- f. Fibre optic cable will be run from the NOC to a wiring closet in the Eastern Nuclear Training Centre ("ENTC") which is located on Ontario Hydro property but outside PNGS. This will require some trenching in the exclusionary zone and overhead cabling over Montgomery Park Road;
- g. Fibre optic cable will be run from the NOC to a wiring closet in the Construction Services Computer Room ("CSCR") which is also located on Ontario Hydro property, but is outside PGS. This cable will connect to an existing mini-LAN at the CSCR;
- h. Within the NOC the fibre optic cable will be connected to the Mainframe through routers, gateways and bridges.

The bulk of the work concerns the installation of fibre optic and twisted pair copper cable. All parties agree that this is a systems upgrade. The project was budgeted at approximately \$4,000,000. A budget of \$300,000.00 was allocated to the labour costs associated with cabling.

3. To understand the true nature of what is at stake in this dispute is to understand the sign of the times. The responding party Canadian Union of Public Employees, Local 1000 ("CUPE") and the complainant Local 1788 have lived for many years in industrial peace. Each union viewed its collective bargaining relationship with the employer Ontario Hydro ("Hydro") in the same way. CUPE saw itself as representing the maintenance workers within the Hydro family while Local 1788 represented Hydro's direct hire electrical construction workers. This peaceful coexistence was brought to a shattering end as a consequence of the restructuring of Ontario Hydro, the purchase service agreement between Hydro and CUPE and the reality of no new construction. These three factors, and perhaps other unnamed ones, created a tension between two unions about the issue of where does maintenance begin and construction end and vice versa?

4. A Jurisdictional dispute responds to the parties' need for certainty of work assignment. The Board is requested to assess, in a forensic way, what has happened in the past in respect of the work that has been assigned. The Board reviews certain factors including agreements between the trade unions respecting the work in question, the competing collective agreements, the skill and ability of the competing work force; the economy and efficiency of the competing work force; employer preference, employer practice in assigning the work and past practice in a given Board area or in the province as a whole within a sector of the construction industry.

5. The case at hand, deals with an industrial work force on one hand and a construction work force on the other. The above noted factors have to be modified to deal with these particular, and in some ways unique, work assignment problems.

6. The panel during its deliberations focused on four factors; the competing collective agreements; the skill and ability of the work forces; employer preference; and Hydro's practice in respect of the work in dispute within the Province of Ontario. In this particular dispute, both work forces are directly hired by Hydro. Although this arises in an Electrical Power Sector context, Hydro is the direct employer, consequently we did not take into account practice as it relates to other employers within the Electrical Power Sector. The only practice that we reviewed was practice in relationship to assignments, made by Hydro to either CUPE or Local 1788.

The Collective Agreements

7. Article 1.1 the recognition clause of the collective Agreement between Hydro and CUPE states:

- 1.1 Ontario Hydro recognizes the Union as the sole bargaining agent for all regular, part-time and temporary employees*, including technicians and clerical employees of the construction field forces but excluding:
- (a) Employees now represented by other bargaining agents.
 - (b) Employees assigned to full-time security work.
 - (c) Persons above the rank of working supervisor.

Article 14.0 of the Collective Agreement between Hydro and CUPE states:

ARTICLE 14

EMPLOYMENT SECURITY AND WORK ASSIGNMENT

14.0

It is the Corporation's intent to use regular staff to perform most of its work of a continuing nature. Furthermore, the Corporation will strive to provide regular staff stability of employment.

The Working Paper on Staffing and Employment dated March 15, 1985 states Management's intentions with regard to continuity of employment for regular staff and proportions of work expected to be undertaken by regular staff. For at least the term of this Collective Agreement, Ontario Hydro will not reduce the stated proportions of work to be done by regular staff.

At the end of each six-month period commencing January 1987, Ontario Hydro will prepare a statement showing the proportions of work done by regular staff and make this information available to the OHEU.

It is understood that the Working Paper on Staffing and Employment, as distinct from the terms of the above provisions, does not form part of the Collective Agreement and is not subject to the grievance and arbitration process.

Article 14.1 of the collective agreement states:

14.1 Work Assignment

1. It is understood that the assignment of work to purchased services does not convey a right to such work in the future, nor does it create any precedent with respect to future assignment of such work to purchased service employees by the employer.
2. It is agreed between the parties that no more than 450 Ontario Hydro tradespersons will be assigned by the Corporation at any one time under the EPSCA Maintenance Assist agreement to perform work for the Corporation. The Corporation agrees to inform the Union of the number of Ontario Hydro tradespersons assigned under the EPSCA Maintenance Assist agreement on a monthly basis.

Article 3.2.1.3 of the Working Paper on Staffing and Employment referred to in Article 14 above states:

3.2.1.3 Construction

Ontario Hydro will use members of the International Building Trades Unions together with Ontario Hydro's technical and administrative support staff to perform its construction work for additions, modifications, rehabilitations, and terminations of Generation and Transmission facilities when it is the direct employer. Construction work that is contracted may be performed by members of the International Building Trades Unions or others, depending upon the conditions of the tendering document.

The 1992 Memorandum of Settlement between Hydro and Local 1788, which is part of the collective agreement between the parties, included a separate memorandum which deals specifically with the issue before us.

Whereas Local Union 1788 has been chartered specifically for Ontario Hydro construction industry work; and

Whereas Local Union 1788 has performed construction industry work beyond the scope of the EPSCA Collective Agreement and will continue to perform this work when done by Ontario Hydro; and

Whereas it is the desire of the parties to clarify the interfaces and working arrangements for maintenance and construction industry work performed by any Ontario Hydro Branch with Ontario Hydro employees on Ontario Hydro generating facilities to promote harmonious working relations between the Ontario Hydro branches and their respective unions.

The parties agree to the following which will form part of the collective agreement:

It is recognized that Local Union 1788 is the Bargaining Agent for a unit of employees as defined in Section 200 B of the Collective Agreement for all construction industry work performed by said employees of Ontario Hydro on Ontario Hydro generating facilities. This excludes maintenance assist type work performed in the past by Local Union 1788.

The parties agree that the intent of this document is to preserve the status quo regarding the determination of construction industry work. Should a dispute arise on whether work to be performed by Ontario Hydro is maintenance or construction industry work, the parties agree to establish a final and binding tripartite (IBEW Local 1788, CUPE Local 1000 and Ontario Hydro) Dispute Resolution Process along with determinative Decision Criteria including Ontario Hydro's past practice.

Nothing in this agreement limits Ontario Hydro's right to contract work.

Section 2 of the 1988-1990 Collective Agreement between Hydro and Local 1788 states:

SECTION 2 SCOPE OF AGREEMENT

**200
Recognition
REV**

A. agency for a bargaining unit as defined in Item B engaged in all construction industry work performed in the Province of Ontario on Ontario Hydro property for the Generation Projects Division of Ontario Hydro. This work includes the building of generating stations, hydraulic works, heavy water facilities, microwave and repeater stations, but excludes the building of commercial type office facilities at urban locations remote from operating facilities and any work performed by Ontario Hydro on a Miscellaneous Hydraulic Project.

B. The bargaining unit under this Agreement shall comprise the following classifications:

Electrician Journeyman including Foreman and Subforeman
 Electrician Welder
 Electrician Apprentice
 Communications Electrician.

If additional classifications are required, they will be negotiated as appropriate for work in the electrical power systems sector.

- C. The Union recognizes EPSCA as the sole and exclusive collective bargaining agency for all of the Employers covered by this Agreement, and in all matters pertaining to the administration of this Collective Agreement.
- D. The term "employee" shall include all employees of the Employers in the classifications as set out in Item B above.
- E. A subforeman is an individual who exercises supervisory responsibility and may use the tools of the trade.
- F. The term "Employers" shall include individual members of EPSCA and any company, partnership, sole proprietorship, joint venture, contractor, subcontractor or any person that agrees to be bound by the terms and conditions of this Agreement.
- G. Notwithstanding the provisions contained in this Subsection, this Agreement does not alter existing agreements and practices operative between individual Employers and the Union with respect to General Foremen.
- H. The classifications referred to in Item B do not establish craft jurisdiction. Such jurisdiction is established in accordance with Section 4 of this Collective Agreement.

200
 Form of
 Agreement

- B. This Agreement shall consist of a master portion of general application to the construction field forces represented by the Union together with the following Appendices and/or wage schedules of particular application to employees represented by the Union at Projects or in areas as noted in Subsection 202 below, and shall also be deemed to include any additional Appendix and/or wage schedule added, as the said Appendices and/or wage schedules may be revised by EPSCA and the Union from time to time.

This clause remained substantially unchanged in the 1990-1992 Collective Agreement between the parties. In the 1992-1995 agreement, sub-section A of Section 2 was modified to read:

SECTION 2 - SCOPE OF AGREEMENT

DELETE AND REPLACE WITH:

200
 Recognition

- A. EPSCA recognizes the Unions as the exclusive bargaining agency for a bargaining unit as defined in item B engaged in

i) all construction industry work performed for or by Ontario Hydro undertaken by Design and Construction/ENCON Services Branch on generating facilities,

ii) all Major* construction industry work which is tendered/contracted for all other Divisions of Ontario Hydro and,

iii) work performed by the Design and Construction/ENCON Services Branch for any Operations Branch of Ontario Hydro where it has been determined by that Operations Branch that there does not exist internally the expertise or the current staff to perform the work.

This work shall be performed in the Province of Ontario on Ontario Hydro property for generating facilities. This work includes the building of generating stations, hydraulic works, heavy water facilities, microwave and repeater stations but excludes the building of commercial-type office facilities at urban locations remote from operating facilities and any work performed by Ontario Hydro on a Miscellaneous Hydraulic Project. The work encompasses:

- construction of new facilities
- additions to existing facilities
- modifications
- rehabilitation
- reconstruction of existing facilities

* The definition of Major described in ii) above and any issues arising out of the interpretation of Major shall be dealt with in an attached Letter of Understanding.

This Agreement shall become effective May 1, 1992 and will expire on April 30, 1995.

8. Although Local 1788 and Hydro attempted to create a dispute resolution mechanism, (see the memo of settlement above) they were unable to agree to one. The bargaining relationships between the parties were set up with the intention of avoiding overlap. However, as a consequence of the parties failure to delineate a distinction between maintenance and construction a large grey area has developed. This grey area specifically comes into focus in respect to construction electricians on one hand and maintenance workers on the other in respect of Modifications.

9. The collective agreement between Hydro and CUPE does not, on its face, cover construction electricians as the agreement does not refer to them specifically. The collective agreement between Hydro and CUPE is a very large document. It includes a master portion and seven parts. We do not intend to reproduce each part within this decision. Only in Part B, of the agreement, entitled Maintenance Trades, and Part E of the agreement, entitled Construction Weekly-salaried -Clerical and Technical is there any indication that the parties, in their collective bargaining relationship attempted to deal with the maintenance-construction dichotomy. Counsel for the Local 1788 argued, and it was not contested, that Part E of the agreement, covered employees who worked with the design group and employees who gave administrative support to the construction group. Employees, covered by this part of the agreement, do not work on the installation of LANs. Within Part B of the agreement, entitled Maintenance Trades, the parties have negotiated categories of employees that closely resemble the construction trades. Counsel for CUPE, acknowledged that although the CUPE agreement does not cover construction work, in the Hydro sense of that term, CUPE forces have done modifications and rehabilitations which might be caught by the definition of construction in the *Act*.

10. In respect of the work performed on the LANs, that work was not done by employees pursuant to Part B of the agreement, but rather by shift control technicians. These technicians are covered by Part G of the agreement. Part G covers nuclear generating stations. These technicians, according to their job classification, generally perform tasks that include installations, commissioning, *modifications*, overhaul inspections, troubleshooting, repair and preventive maintenance in respect of electrical-electronic control instrumentation, and computer equipment and/or systems.

11. All parties agree that Article 3.2.1.3 of the working paper on staffing and employment which is referred to in Article 14, attempts to maintain the status quo, with CUPE forces doing maintenance work and Local 1788 doing construction work. What the parties do not agree about is the definition of construction that the panel should be bound by in reviewing this dispute.

12. Generally speaking, within the context of a jurisdictional dispute, the panel must satisfy itself that both collective agreements are able to be interpreted such that the work in dispute is covered within each trade unions jurisdictional work claim. In respect of Local 1788, it is clear and unambiguous, that the work in dispute is covered by their collective agreement with Hydro. In fact, none of the parties argued otherwise. In respect of CUPE, although it is not clear that the work in dispute falls within the ambit of their collective agreement with Hydro, there is enough ambiguity in respect of how the agreement has been applied such that the panel declines to decide this case on the basis that there is no jurisdictional claim in the CUPE collective agreement in respect of the work in dispute.

Skill and Ability

13. Counsel for Local 1788 argued that in respect of the definition of “construction”, the *Act*, the Board’s jurisprudence, and joint HydroCUPE documents, indicate that the work in dispute should be characterized as “construction”. The reason for the upgrade of the system was to increase the overall capacity. The Board in a line of cases that includes *Master Insulators Association of Ontario Inc.*, [1980] OLRB Rep Oct. 1477; *National Elevator & Escalator Association*, [1991] OLRB Rep April 555; *Abitibi-Price Inc.* [1986] OLRB Rep. Dec. 1613; *Briecan Const. Limited*, [1989] OLRB Rep. May 417; has found that work involving the addition to or replacement of equipment for the purpose of either increasing the capacity of the facility or system, or restoring the ability of a facility of a system to function properly is appropriately characterized as construction work. The *Trades Qualification Act* R.S.O. 1990 Ch. T.16 and the regulations thereunder, provide that certified journeymen construction electricians, and registered apprentices are qualified to do the work in dispute. Section one of Regulation 1051 states:

REGULATION 1051

ELECTRICIAN

1. In this Regulation,

“certified trade” means the trade of electrician;

“electrician” means a person who,

- (a) lays out, assembles, installs, repairs, maintains, connects or tests electrical fixtures, apparatus, control equipment and wiring for systems of alarm, communication, light, heat or power in buildings or other structures,
- (b) plans proposed installations from blueprints, sketches or specifications and installs panel boards, switch boxes, pull boxes and other related electrical devices,
- (c) measures, cuts, threads, bends, assembles and installs conduits and other types of electrical conductor enclosures that connect panels, boxes, outlets and other related electrical devices,
- (d) installs brackets, hangers or equipment for supporting electrical equipment,
- (e) installs in or draws electrical conductors through conductor enclosures,
- (f) prepares conductors for splicing of electrical connections, secures conductor connections by soldering or other mechanical means and reinsulates and protects conductor connections, or
- (g) tests electrical equipment for proper function,

but does not include a person who is permanently employed in an industrial plant at a limited purpose occupation in the electrical trade.

Counsel submitted that by law the work in dispute can only be done by certified construction electricians. The shift control technicians, are not required by, their terms of hiring, to be certified construction electricians.

14. In respect of this factor, it is clear that the Local 1788 has the skill and ability to do the work in question. It is not at all clear that the shift control technicians, represented by CUPE, as a group have the requisite skill and ability to do the work in dispute. It may be that individual technicians hold appropriate qualifications however that alone does not, in our view, allow us to find that the control technicians have the requisite skill and ability.

Employer Preference

15. Hydro, preferred using CUPE forces in respect of this work because CUPE forces were significantly less expensive. According to Hydro, CUPE forces had done this type of work previously.

16. Hydro is one of the largest employers in the Province. Hydro has attempted to put in place a mechanism for work assignment between CUPE and Local 1788. Part of the mechanism includes a document entitled PW-46 Purchased services. This document is a joint Hydro-CUPE document which attempts to deal with issues of contracting out of work performed by CUPE 1000 members on a consensual bilateral basis. Local 1788 is not a party to this agreement however, this agreement has a direct affect on Local 1788's members. CUPE in these proceedings has taken the position that the work in dispute is a "minor modification " and consequently within CUPE's work jurisdiction. Counsel for the employer referred the Panel to a document entitled Field Work Assignment. The purpose of this document is to define the functions of the Production Branch, the Regions Branch, and the Design and Construction Branch with regard to the Bulk Electricity System (B.E.S). This document provides an overview of the working arrangements in the field or at the site of generating stations and other facilities of the BES. In short, and in the context of how this document affects this dispute, both the Production Branch and the Regions Branch undertake minor modifications where design work is not involved, and at their discretion may install or undertake minor modifications and participate in installation of any other "change" work designed and supplied by the Design and Construction Branch using regular staff to the extent that regular CUPE trades with appropriate skills are locally available. The Design and Construction Branch's main functions are the design, development and construction of new facilities for the BES. However when design, provided by the Design and Construction Branch is involved, it also has the responsibility for providing modifications, additions, and rehabilitations to in-service facilities of the BES, using field work.

17. This document indicates that when the Design and Construction Branch is involved, then the work is usually done by construction forces (for our purposes Local 1788), however when Design and Construction Branch is not involved, then the work usually gets performed by CUPE forces. This document does not include a definition of minor modification. However, the Guidelines For Mid-Term PW-46 Implementation includes a definition of minor modification:

• • •

(c) Minor modifications which include:

- modifications which are incidental to larger maintenance,

- modifications not involving Design Services from the ENCON Branch, or
- modifications which are component upgrading during preventive or breakdown maintenance.

18. In November 1991, IBM proposed that it use construction electricians to install all twisted pair copper and fibre optic cable required for the upgrade. Hydro claims that this was too expensive as it would have cost \$300,000 to do the work. Hydro submits that the shift control technicians group could do the same work less expensively. Hydro did not ask ENCON (the construction arm of Ontario Hydro) to submit a bid. This was very unusual, and not in keeping with Hydro's normal practice. Further, the system upgrade was initiated on the basis of an Engineering Change Notice ("ECN") which requires the involvement of the Design and Construction Branch. The system upgrade was not incidental to larger maintenance nor was it a component upgrade during preventative or breakdown maintenance. The system upgrade was not of the minor modification variety. Hydro, in giving the work in dispute to the shift control technicians, failed to follow its own internal work assignment mechanisms.

Employer Practice

19. The practice factor is an extremely important part of the jurisdictional dispute. In many instances it can be the determinative factor. Jurisdictional disputes, as we noted earlier, assess, in a forensic way, what has happened, in the past to the assignment of the disputed work. Past practice, and in this case employer practice, is a gauge by which a panel can determine who has done the work over a period of time. The most compelling practice relates directly to the work in dispute, and arises in contests where all interested parties know about and have the opportunity to participate. In a construction industry case, practice is usually developed and tested in a mark-up meeting. All parties are put on notice about the work that is to be assigned. All competing trades make a pitch, to the employer, based on their understanding of their own work jurisdiction. After the employer awards the work, the losing trade can file a grievance or a jurisdictional dispute or otherwise seek to challenge the assignment, or accept the work assignment. In accepting the assignment, the losing trade is in effect acquiescing in the work assignment. The trade that received the assignment will include, in the future, that job as part of its practice in respect of that type of work.

20. This case is unusual in that there is no formal mechanism in Hydro's practice for the two unions here to assert that certain work should be theirs, other than the grievance procedure or the Jurisdictional Dispute. Hydro does not have mark-up meetings for work assignments which involve work, that both CUPE and Local 1788 might claim. Hydro does not notify, nor is it legally bound to notify, either CUPE or Local 1788 about work assignments in respect of work that both CUPE and Local 1788 might claim. Hydro, as indicated above has created an internal mechanism which does not involve Local 1788 until after the work has been assigned. This clearly makes it difficult for the competing unions to develop practice and then insure that the practice is being followed.

21. In this regard, CUPE has an advantage over Local 1788. First, CUPE is a party to PW-46, which as stated above, is a mechanism to decide who is going to be assigned work that can be performed by CUPE members in accordance with their collective agreement. In this respect, work that is claimed by both CUPE and Local 1788, is not exempt from the PW-46 process, consequently CUPE has an opportunity to participate in the assignment of work, while Local 1788 does not. Local 1788 does not get notified about the work assignment awarded to CUPE. Local 1788 can only find out, and subsequently complain about the work assignment, by seeing the work in progress and then grieve or file a Jurisdictional Dispute.

22. The second advantage relates to access to the sites or facilities. Local 1788 is a construc-

tion union. Local 1788 operates a hiring hall. Local 1788's members are not permanent employees of Hydro. These employees only work when they are requested by Hydro off a hiring hall list. CUPE members are part of an industrial work force. CUPE does not operate a hiring hall. CUPE members are at work day in day out. CUPE members are stationed on most sites and facilities in Hydro. They have access to almost all the sites and facilities. They can review all assignments made by the employer and consequently have the ability to complain through their grievance process or through a Jurisdictional dispute. The same can not be said about Local 1788. Local 1788 does not have access to the various sites and facilities unless they are working at a site or facility. Even when a member of Local 1788 has been requested from the hiring hall, the work that the member is assigned to will be for the most part a specific project. This work assignment does not guarantee the member access to the whole site. In this way practice may be developed by CUPE which has not been tested by Local 1788.

23. Practice that has developed because of lack of access to facilities or sites or because there is no mechanism by which all parties participate in the assignment of work may be given little weight by the Board. Of course, there may be circumstances where such practice evidence is of assistance; for example where it illustrates the certain work has not been considered by the parties to the collective agreement to have fallen within the work jurisdiction under that collective agreement. However, where parties to the agreement seek to rely on practice evidence of assignments made pursuant to the agreement, and the other union(s) have not been aware of, nor participated in, the assignments, this practice evidence provides little guidance in helping to answer the question before the Board: where there is a dispute between two trades or unions over a work assignment, which of the two ought to have been assigned the work? Assignments made without the knowledge or participation of one of the unions can therefore be of limited assistance in determining which competing union should have received the work.

24. Hydro filed with the Board eight assignments where CUPE allegedly performed work which is similar to the work in dispute before this panel. CUPE filed five assignments, where CUPE allegedly performed work which is similar to the work in dispute. Local 1788 filed with the Board seven assignments where Local 1788 allegedly performed work which is similar to the work in dispute. In respect of the Hydro practice evidence, we find that the work in respect of: the new turbovisory system; the generator temperature monitoring system; the Ion chamber wiring relocation; and the new regional over-power computers in Generating Station "B" at Pickering, NGS, done by CUPE, was done after the work had been turned over by the construction forces. This work mostly involve the commissioning of the system. In respect of the other past practice evidence, we accord it little weight. This evidence was gained without Local 1788's knowledge. We accept the practice of Local 1788 which was uncontested at the consultation. This substantial practice, involving work similar to the work in dispute, indicates that Local 1788 should have done the work in dispute.

25. In summary, for the above reasons we determined that the correct assignment of the work in dispute was to Local 1788. Had Hydro followed its own prior practice, it would have allocated the work to Local 1788. The members of Local 1788 had the requisite skill and ability, while only some of the CUPE members did. The work in dispute is "construction" work, and not "maintenance", and the historic division of work at Hydro between these two unions relegates "construction" work to IBEW members. Relevant past practice at Hydro indicates that such work is performed by members of Local 1788.

1226-93-U; 1238-93-R Amalgamated Clothing and Textile Workers Union, Applicant v. Royal Shirt Company Limited, Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated Act by discharging certain employees and by seeking return of materials provided to employees by the union - Board directing that employees be reinstated with compensation and certifying union under section 9.2 of the Act - Board directing that union be permitted to convene meeting of employees on company premises during working hours and directing employer to provide union with list of employees' names, addresses and telephone numbers

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

APPEARANCES: *Marisa Pollock* and *John Wensley* for the applicant; *Geoff Shaw*, *Sari Springer*, *Luigi D'Abbondanza*, and *Mary D'Abbondanza* for the responding party.

DECISION OF M. A. NAIRN, VICE-CHAIR AND BOARD MEMBER P. V. GRASSO; November 12, 1993

1. Board File No. 1226-93-U is a section 91 complaint filed by the applicant on its own behalf and on behalf of three employees whose employment was terminated. Board File No. 1238-93-R is an application for certification in which the applicant is relying on section 9.2 of the *Labour Relations Act* (the "Act") by way of remedy.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. On May 20, 1993, Anthony Bellisario, then employed as industrial engineer and plant manager, and Ricardo Zurito, responsible primarily for operating a computerized marker program, were terminated from their employment. On May 21, 1993, Marie Brown, employed in the shipping department, was terminated from employment. It is the position of the union that these decisions to terminate the employment of these employees was "tainted" by anti-union animus. It is the position of the responding party that these employees were terminated from employment for cause and not for any improper motive. It is not in dispute that the owners of the company made these decisions and that at the time of these terminations the owners were aware that the union had commenced an organizing drive with respect to its employees.
4. In addition to the terminations of the three employees, the applicant seeks to rely on certain other alleged employer conduct, occurring during the organizing campaign, to support its request for section 9.2 relief in its certification application and in its request for relief under section 91 of the Act.
5. The legal principles to be applied to the determination of the section 91 complaint were not in dispute. The parties referred to a number of the same earlier decisions of the Board in their submissions to the panel. It is clear that in assessing the reasons for discharge of an employee the Board is not seeking to determine whether there was just cause for the discharge, but rather whether the decision to terminate employment was in any way motivated by reason of union activity. Two decisions, often cited, summarize the nature of the exercise. In *The Barrie Examiner*, [1975] O.L.R.B. Rep. Oct. 745 at paragraph 17, the Board stated:

... In its earlier decisions, this Board has stated that, even if only one of the reasons for a dis-

charge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

6. The question of motive is a factual one based on all the circumstances. In *Pop Shoppe (Toronto) Limited*, [1976] O.L.R.B. Rep. June 299 at paragraph 5, the Board described the nature of the often inferential reasoning process when assessing the evidence:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, usual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16.278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

7. Having set out the nature of the Board's inquiry regarding the section 91 complaint, and also having carefully reviewed the evidence and submissions of the parties, we are of the view that the employer did violate the Act. The extent of those violations and our reasons for so concluding follow.

8. At the outset a few remarks concerning the credibility of witnesses' is in order. These matters were heard over fifteen days. Much of the evidence was ultimately of only limited relevance to the issues in dispute and will not be referred to here. The Board's findings of fact have been made taking into account issues of credibility wherein we have assessed various factors including the witnesses' demeanour in giving their evidence, the consistency of that evidence when compared with other evidence of that witness and others, the apparent ability of a witness to resist their own self-interest and overall, assessing what was most reasonable and probable in the circumstances. While much was said in submissions by the parties concerning various alleged inconsistencies or discrepancies in the evidence we note that many of those matters relied on reflected the differing perspectives brought by various individuals to events and the various individual ways of expressing those different perspectives.

9. However, we note at this stage and will review examples as we review the evidence, that the evidence of the company's owners was oftentimes contradictory, both in relation to their own

and each other's evidence. A number of assertions pressed in their examinations in chief were retracted or considerably qualified in cross-examination. Others were contradicted by the evidence of others called in their support. Both Luigi and Mary D'Abbondanza were quick to draw conclusions based only on speculation and Mr. D'Abbondanza asserted wrongdoing on the part of Marie Brown for the first time in his evidence, when such allegations had not been made earlier either in the pleadings or by Mrs. D'Abbondanza in her evidence.

10. The background facts relevant to these disputes can be summarized as follows. The responding party ("Royal Shirt" or the "company") manufactures fine quality shirts. It is owned by Luigi and Mary D'Abbondanza. (We note that we will refer informally to the owners and to the employees by their given names for ease of exposition). This husband and wife team started tailoring shirts at home in the late 1960's. Over the years they have successfully developed the business and it has grown to a point where it now has facilities in the City of Vaughan and employs approximately sixty people. The bulk of the manufacturing (approximately eighty-five percent) is done through the company's stock department. Many of its customers purchase shirts to be sold under the customer's own label. For example, the retailer Holt Renfrew is the company's largest customer, providing approximately thirty percent of its business. The shirts produced for Holt Renfrew are then sold under its label. In addition to the stock department, the company produces custom shirts for various clients. The operation is basically broken down into the stock department, the custom department, and the cutting room. There are approximately fifty-four people employed in the bargaining unit agreed to between the parties for the purposes of this application for certification. In addition, the company employs sales persons, a controller, and two or three office and reception staff.

11. Luigi and Mary D'Abbondanza perform active roles in the company. In addition to overseeing the operation in its entirety, Luigi works primarily with the patterns and markers at the beginning of the production phase. Mary spends time in day-to-day management and marketing. It is apparent that the two work very much as a team and are involved in all aspects of the business.

12. The company also employs other family members both in the plant and in the office. There are also a number of long term employees in the plant. The bargaining unit applied for includes those persons employed in the plant, save and except supervisors. This includes primarily sewing machine operators and other persons employed in the production process such as cutters or finishers, in addition to general labour and support services such as shipping.

13. On April 28, 1993 the applicant (or the "union") responding to tentative inquiries from employees of the company, decided to leaflet cars parked in the company's parking lot. To that end, John Wensley and Tony Pileggi, both staff representatives of the union, attended at the company premises late in the afternoon and proceeded to place leaflets under the windshield wipers of cars parked there. That leaflet was to the attention of Royal Shirt employees and suggested, essentially, that if they were interested in better terms and conditions of employment they could join the applicant. It identified other shirt manufacturing companies where the union represented employees and invited employees to call Mr. Pileggi or Mr. Wensley.

14. Having distributed the leaflets, the two men positioned themselves across the street in Mr. Pileggi's car to observe employees as they left work at the end of the day. Prior to that time however, Mr. Waxberg, an individual from a neighbouring company came out of the building and removed a small number of leaflets from the cars. He proceeded to enter Royal Shirt's premises. He spoke briefly with Luigi Squazzin, the company's Sales Director, for the purpose of showing him the leaflet. A few minutes later he left and walked across the street to a doughnut shop. On his

return a few moments later he met with Mary D'Abbondanza who had just returned to the premises whereupon he showed her the leaflet.

15. We heard detailed evidence including viewing photographs, concerning the events surrounding this exchange on April 28. There was conflicting evidence concerning whether Mr. Waxberg then removed some or all of the leaflets, or whether Mary removed some leaflets and ultimately whether Mary had all of the leaflets in her possession on entering the Royal Shirt premises. Whether or not the removal of leaflets ultimately constituted some form of interference with the union's organizing attempt is unnecessary to determine in the circumstances. It is sufficient to note that at this time, Mary was aware that the union had visited the premises and was seeking to attempt to organize the employees, and that as a result of immediate discussion with members of the management team, they were similarly aware of the events of April 28, 1993. This included both Mary and Luigi D'Abbondanza, Anthony (Tony) Bellisario, and Luigi Squazzin. We note that everyone agreed that Tony was the most visibly upset by this information and on reviewing the leaflet challenged the claims that the union was asserting.

16. Even assuming that Mr. Waxberg left the leaflets under one windshield, it would have been apparent to Mr. Wensley and Mr. Pileggi that the employees of the company would not likely come to know of their attempt to communicate with them in this fashion. The union organizers assumed (as it turned out, correctly) that Mary was connected to the management of the company and that in all likelihood the company was therefore aware that the union had attempted this communication.

17. On Friday May 14, 1993, the union made another attempt at distributing its leaflet. This time, Mr. Pileggi and Andy Trevisan, also employed by the union, attended at the premises to hand out envelopes to the employees as they left work at 4:30 p.m. The envelope contained the leaflet and a union membership application card. After most of the employees had left, Mr. Pileggi was approached first by Luigi Squazzin who asked him for a copy of the leaflet. Mr. Pileggi would not give him one. Following a short discussion Mr. Squazzin returned inside. Subsequently, Ida D'Abbondanza (the owner's sister) approached Mr. Pileggi as well with the same request and was again turned down. Again, regardless of the specifics of these exchanges, it is apparent that management members were aware that the union was again attempting to communicate with the employees, and that on this occasion, the union had been successful in distributing leaflets and cards to most if not all of the employees.

18. Mary and Luigi were not at work on May 14. The preceding Saturday they had left for a vacation in Florida, returning, according to Mary, about 6:00 p.m. on Sunday, May 16. Whether or not the D'Abbondanza's were called and informed of the union's visit immediately on the Friday afternoon, Mary testified that by Friday night she was aware of the events of that day as a result of a telephone conversation with Lisa D'Abbondanza, one of her daughters.

19. There was considerable activity in the shop on Monday, May 17. Mary and Luigi D'Abbondanza usually arrived at the shop early each day and had coffee in the cafeteria along with the employees as they arrived. The shift starts at 8:00 a.m. On this morning the D'Abbondanza's arrived quite early, as did an unusual number of employees, according to Miriam Llano, an employee called by the company. At the time Miriam was one of Tony's assistants and worked primarily in bundling, and she also did payroll. She testified that at about 6:40 a.m. she observed Luigi D'Abbondanza speaking with about twelve employees in the cafeteria in Italian. She noted that they seemed obviously interested in something but she was unable to see what and she left to go to work as Monday is her busy day doing payroll.

20. The union alleges, among other things, that Luigi required employees to return the

union envelopes to him, that he was visibly upset and angry, and that he compiled a list of employees in order to keep track of who had handed in their pamphlet to him. Luigi denied these allegations. Mary testified that they were being congratulated for their 40th wedding anniversary by the employees. However it is not in dispute that there was some discussion of the union. According to Luigi, one employee threw the “paper” on the table and asked him what it was about and he advised her that if she was in favour of the union to sign the card and mail it in. While denying that he asked for their return, he acknowledged that a number of employees did give their envelopes to him at that time.

21. Subsequently, a number of other employees provided him with the envelope they had received. In one instance, Luigi testified that the employee said she had retrieved it from the garbage. He testified that she stated that she had been “telling the truth”, which could be verified because the envelope had sauce on it. Luigi testified that these comments were not made as a result of any interest he held, but were directed at the other employees present. Again on his own evidence, another employee, Anjeska, secretly brought him her envelope and described to him that she had left it in the back of her car.

22. Miriam testified that she brought her envelope into work on Saturday, May 15 and showed it to Ida who took it and returned it to her later. Miriam left it in the office on a shelf but testified that on Wednesday, May 19, she gave it to Luigi because she thought that “maybe it was important for him to have it”. In giving this evidence Miriam initially testified that she brought it in because it was interesting and she wanted to share it with someone. That was Ida, who is Luigi’s sister, and is in charge of shipping and although not entirely clear, appears to be treated as a member of management. Having stated her interest however, Miriam then immediately denied that she had any concern or interest over the material distributed.

23. Ricardo and Marie both testified that Luigi asked for the return of their envelopes. Ricardo did not have one as he had left it with another employee. Marie told Luigi she did not have one and that even if she did, she would not give it to him because, in essence, it was none of Luigi’s business. Luigi denies these conversations. In light of the other evidence, and having considered the evidence of these witnesses, we are inclined to conclude that it is more probable than not that Luigi approached these employees for the return of their envelopes. Overall, the evidence supports the conclusion that explicitly or otherwise, Luigi made it clear to employees that it would be in their interest to deliver the envelope they had received from the union to him and that many of the employees had heard and understood that message. We note that Luigi described the shop as quiet that day - that as he walked about there were noticeably fewer than normal requests for his help.

24. On Tuesday, May 18, Mary and Luigi Squazzin attended at Holt Renfrew for a meeting to deal with the company’s concerns about shipping problems by Royal Shirt. These problems included proper price labelling and incomplete or incorrect shipments. This was the third such meeting (although the first involving Mary) and the customer was not pleased that the problems had not been corrected. In discussion following the meeting, Mary and Luigi Squazzin attributed the problems to Marie Brown. On their return from Holt Renfrew, Mary met with Marie to review these problems and a discussion about Marie’s general state of unhappiness in the shipping department ensued.

25. Mary testified that one reason she fired Marie was because of these problems with Holt Renfrew; the need to keep their biggest customer satisfied, and that Marie was not happy in the job in any event. At the conclusion of their meeting on Tuesday there had been no discussion of Marie being terminated. Mary did offer Marie some time off to look for other work and she was

told she was being taken off the Holt Renfrew account. We have little doubt that at this stage, Mary was hoping that Marie would locate other work and any problem would then disappear.

26. On Tuesday, May 18 in the evening, the D'Abbondanza's decided to hire investigators to follow Tony Bellisario. They both asserted that this was in connection with their concern that he was stealing company information and selling it to a competitor or planning to go into business for himself. We return to that issue later.

27. On Wednesday, May 19, Tony was having lunch in the doughnut shop at the corner when Ricardo, Marie and another employee arrived for lunch. They had met on the way over and Tony was sitting with a supplier who had been at the shop that morning. They all sat at adjoining tables. Luigi Squazzin arrived and as he was getting his order, Marie asked him if he was spying on them. It was unusual for Mr. Squazzin to eat lunch there, although a number of other employees do. Mr. Squazzin joined them. Ricardo, Tony and Marie each testified that over lunch there was discussion concerning the union and that views were expressed, most particularly by Marie who suggested that it might be a good thing. Mr. Squazzin could recall arriving, being asked if spying, his reaction, being asked to sit down with the group, and the nature of the conversation he had with Tony and Mr. Price after the others left.

28. He could not however recall the nature of the conversation with the other employees, and denies that any discussion of the union occurred. He testified he felt he would remember if the union had been discussed as it was an issue because of the leaflets. Earlier in his cross-examination he had testified that the union's visit in April had not been important, in explaining why he could not remember if he had spoken to the owners about it. Mr. Squazzin stated that the union was not really an issue for him although he agreed that it was for the company. He was interested enough however to approach Mr. Pileggi on May 14 to attempt to secure a copy of what was being distributed to employees and to offer money for it. He was bemused by Mr. Pileggi's guess or assumption that he was part of management. In chief Mr. Squazzin gave detailed evidence about employee performance concerns. He acknowledged open communication between he and the owners yet subsequently tended to downplay his interest and interaction with the owners when it was a matter concerning the union. There is little context for the spying comment in the absence of some perceived "taboo" subject. On balance we find that discussion of the union did occur, and that sympathetic views were expressed at least by Marie.

29. In addition it would appear that the investigator hired to follow Tony was also present in the doughnut shop and would have observed these employees together, even if he had been unable to overhear their conversation. It is reasonable to conclude in either event that the owners would have become aware that the employees, including Tony, had been together over lunch, and in the circumstances it is not unreasonable to conclude that the owners would also have been advised of the fact of discussions concerning the union and the views expressed (we have also noted Mary's evidence referred to at paragraph 65 *infra*).

30. On Wednesday, Ricardo told Luigi that he thought he was being followed. According to Luigi, he responded by asking Ricardo what he had done wrong.

31. On Thursday, May 20 in the late morning, both Tony and Ricardo were terminated from their employment. Letters of termination were provided to both and Tony was also forwarded a letter dated the same day from company counsel and filed as Exhibit 16. The letters of termination cite poor performance as the cause. Regardless of the precise events of their exit interviews, it is undisputed that Tony was advised of his termination and escorted from the premises by two large men without being able to retrieve any personal possessions. Similarly, and a short time later, Ricardo was also advised of his termination, escorted out, and told not to return. The office

and reception staff would have witnessed them leaving. Keith Crilly, the company's Controller, testified that the shop was quiet that day and he attributed it to his view that it was unusual to have employees escorted from the premises. The two men were the investigators hired by the D'Abbondanza's. In Miriam's opinion, the shop was quiet three to four days later once employees found out, although she then attributed the silence to Tony's absence and therefore there was "no one to scream at".

32. On Friday, May 21, about 4:00 p.m., Keith Crilly terminated Marie Brown's employment. His first notice that the owners had so decided was that morning. Marie was provided with a letter of termination setting out the reasons for termination as matters of poor performance.

33. At about 4:00 p.m. on Thursday, May 20, the D'Abbondanza's called a meeting of the employees in the cafeteria to distribute a letter concerning the company's view on unionization (Exhibit 20). It sets out the employee's right to freely choose and asks the employees to consider what the company has provided for them. Under "Job Security" and "Respect in the Work Place" the letter states as follows"

Job Security

You will be aware that we have had a difficult time over the past two years and orders have been down a lot. We have made a deliberate decision not to lay off any workers in the plant and each of you who has been with us through this time, has maintained your job while workers at other companies have been laid off. *As well, Royal Shirt has not fired any of its workers for poor work performance and we are confident that jobs will continue to be secure at Royal Shirt.*

Respect in the Work Place

We treat all workers at Royal Shirt with respect and fairness. *No employee's employment has been terminated for poor job performance and we are very tolerant of those who are learning or those who may be having a difficult time.* Your working conditions at Royal Shirt are excellent when compared to some of the other shirt manufacturers. We take all concerns raised about the working environment very seriously. We feel that fair and humane treatment of our workers is the only way to run a company like Royal Shirt and we intend to continue to treat all of our workers as we have in the past.

(emphasis added)

34. While in the abstract this letter is an acceptable expression of the employer's views, the highlighted portion is inconsistent with the events of that week. Mary could not recall the last time an employee had been fired for poor performance. Within twenty-four hours surrounding the distribution of the letter, three employees were fired allegedly for poor performance. In the context of all the week's events, what conclusion is an employee likely to draw about the message being sent? The terminations and the distribution of the letter are so closely linked in time that it is probable that the initial employee reaction would certainly contain confusion as to the reasons why these three were suddenly fired, and would likely cause doubt in an employees' mind as to the limits of the employer's stated tolerance if performance is not the issue.

35. Approximately one week after distributing the envelopes, Mr. Pileggi and Mr. Wensley were unsuccessful in their attempts to have any further communications with employees, including those with whom they had had their first contact. They received one membership card through the mail dated May 20, 1993 which was filed in support of this application for certification.

36. Having set out an overview of the events in the workplace during the week of May 17,

following the union's distribution of the envelopes, it is necessary to review the reasons for termination provided to the employees and relied on at the hearing. It is ultimately unnecessary to recount all of the evidence in its entirety. The issue that the panel must determine is whether or not the decisions to terminate the employees' employment was for any improper motive under the Act. We need not determine whether the employer had cause for termination, although as outlined at the outset, the existence or not of conduct that would support a finding of cause for termination may speak to the motive for the decision.

37. Determining whether the decisions to terminate the employment of the employees were improperly motivated in this case has been both more straightforward than in many cases and more unusual in at least one respect. The timing of the decisions, the reasons stated for the decisions, the rationale and conduct underlying those reasons, in light of other events in the workplace, in many cases on the basis of the evidence of the owners, satisfy us that the decisions were based at least in part on a belief that these employees were involved in the union campaign and that it was necessary at that particular time to "clean house"; to remove from the workplace the perceived elements of support for the union. Both the D'Abbondanza's used that term in describing why they felt it necessary to terminate the employees' employment that week when problems relating to their performance had allegedly been apparent for some months. At the same time the case is unusual because one of those individuals was a member of management and we are not persuaded that he played any role in supporting the union or its campaign.

38. The letter of termination provided to Tony on May 20 states that his performance had not improved, but had degenerated despite discussions regarding improvement. It refers to a "blunt" admission on May 17 of an inability to handle staff, and that an ability to supervise and direct employees was a principal function of the job. It asserts that his failure to complete a number of important projects without justifiable explanation has been considered a substantial item of non-performance. In its reply to this complaint, in addition to the matters raised in the letter, the company asserts Tony failed to report to the owners despite specific instruction to do so; failed to consistently meet schedules, made errors with respect to piecework and payroll; and improperly removed company property from the premises. Some of these additional matters are referred to in the letter from counsel also dated May 20 wherein they are stated to be in addition to those matters set out in the letter provided directly to him.

39. At the hearing the D'Abbondanza's concerns regarding Tony were twofold; there were performance issues that primarily involved his alleged failure to implement a piecework system for employees in the shop, and they suspected that Tony and Ricardo were stealing company information. The complaint of his alleged failure to implement a piecework system of wage rates included the concerns of failing to meet deadlines, making errors in piecework and payroll, and failure to complete important projects without justifiable explanation.

40. Tony was hired pursuant to a government program designed to enhance the technical skills available to manufacturers such as Royal Shirt. It was a three year contract wherein the government picked up half of the employee's salary in the first year, and a decreasing amount in the second and third years. The goals of the project must be outlined and the company's proposal is reviewed by an industrial engineer, among others, to assess its appropriateness prior to approval.

41. Royal Shirt had wanted to implement a pure incentive system for some time. Tony's educational background is that of an industrial engineer in the textile and apparel industry and he had experience with piecework systems from prior work. He learned of a new software package designed, essentially, to track all aspects of the production process in the context of a piecework system. We heard evidence from Mordie Geist, the designer of the program. For example, once

piecework rates were established for an operation, a ticket could be computer-generated to move with the fabric and enable each operator to track her output. That information from the operator is inputted to the computer by means of "wandering" (an electronic scan) and that information is then utilized to generate payroll information. Information concerning all aspects of the production process can also be gathered in order to assist in determining problem areas, inventory controls, etc.

42. Tony approached Mary in the fall of 1991 in the hope of convincing her to purchase this system and hire him to get it up and running. Together they completed the application form for the program, with Tony supplying much of the technical information and Mary relying on his expertise for that. In late 1991 and early 1992 Tony worked with the company in anticipation of the introduction of the computer system. Mary testified that Tony was part of the "package" that they purchased from Mr. Geist. Luigi testified in chief that Tony began employment in the fall of 1991 and that Tony told him the piecework system would be running by January or February 1992, and that the company was paying Tony for this time. In fact none of this was the case and Tony only began receiving remuneration for his work in March 1992 when he went on the company payroll pursuant to the approved grant program. This is important in the context of the time frames that the D'Abbondanza's assert for the appropriate completion of work by Tony.

43. According to Mr. Geist, the system was installed in January 1992 and he surmised that it would take approximately 6-7 months to get it to ninety percent completion. What he meant by "completion" is not entirely clear but he stated that by that time Tony would be trained and have a basic understanding of the program; that he would be capable of putting product (a shirt) on the computer and breaking it down into the required operations. We note that each shirt requires approximately 50 operations in its manufacture and because of the variety in styling there are over 400 operations performed in the production of shirts in the stock department alone.

44. In order to get the system implemented, Mr. Geist testified it was first necessary to determine all the operations in order to be able to produce a ticket for each. This is done in the initial absence of the piecework rates being established. Then for each operation, time studies are conducted so as to determine the appropriate time standard for each operation. These are described in minutes, calculated to three decimal points. Base rates and rate structures must also be determined so that an operator is aware of both the standard time and the applicable rate considered to represent one-hundred percent efficiency for each operation. Once fully implemented a piecework system contemplates that employees are paid based on the number of operations performed, and if above the amount set for the standard, the employee will earn more (they will, in effect, be performing at greater than one hundred percent efficiency).

45. The introduction of such systems is often fraught with anxiety for employees as they wait to see if rates and times are set fairly or whether they will be "pushed" in order to continue to be able to earn the same as before the implementation of the system, or, that once efficiencies meet or exceed one-hundred percent will standards be adjusted to the advantage of the employer. This potential was recognized by Tony and by Mr. Geist who testified that it was necessary to earn the trust of the employees first through the complete and correct implementation of the tickets before piecework rates are implemented, and that there is an ongoing process of review and adjustment in conjunction with the operators.

46. At Royal Shirt two individuals had previously attempted to implement a piecework system and had not been successful. When Tony arrived, employees were being paid a guaranteed hourly rate plus a production bonus. There were piecework rates available from the work done earlier but neither Mr. Geist nor Tony felt they were very good. However they initially used these rates to, in a sense, "test-run" the system for producing tickets. However these would not have

been used in the final program and Mr. Geist agreed, as did the owners, that Tony was required to do time studies in order to revise these numbers.

47. From the outset of their evidence both D'Abbondanza's asserted that Tony promised them that the stock department would be on piecework by May 1992. In support of that assertion they referred to a schedule filed as Exhibit 3, produced by Tony in March 1992. That document is a listing of the operations in the stock department. Some have been highlighted and a completion date for the setting of the rate for that operation is given. About one-third of the total operations for the department have been highlighted and the last date is noted as May 31, 1992. The conclusion asserted by the owners is simply untenable. There is nothing in the document to support a conclusion that the stock department would be on piecework by May 1992, and in light of the nature of the work involved a two month time frame in order to be at that point is highly improbable. The overall objectives outlined in the grant application contemplated a three-year time frame. Both D'Abbondanza's denied that that time frame was relevant in any way.

48. The D'Abbondanza's repeatedly stated that they relied on Tony's own estimations of time and his own assertions concerning the completion of various tasks and that he failed to meet his own deadlines. Yet neither the document nor Tony's evidence supports the conclusion that he planned to have a piecework system up and running by the end of May, 1992. This is perhaps the clearest example of exaggeration on the part of the owners, in terms of their purported expectation of performance and the alleged failure in that regard.

49. Mr. Geist testified, as did Tony, that the owners had made it clear that they were not happy with the amount of time being taken for the implementation of piecework. Luigi was particularly impatient and according to his evidence, was prepared to fire Tony in the summer of 1992 because he had failed to have the system implemented by May 1992. Mr. Geist's evidence was clear however that the progress of the implementation of the piecework system, while a little slow, was within the normal expected range. He acknowledged that the owners were unhappy with that but stressed that it had to be done correctly or the employees would not accept it and it would not work. These unrealistic expectations of the owners concerning the initial implementation of the piecework system fostered mistrust from the beginning. It seems they quickly began second-guessing many of Tony's decisions. In October, 1992, Keith Crilly did contact a representative of the program to find out if they could replace Tony if the company was unhappy with his work, but no action was taken.

50. On December 1, 1992 a meeting was called by Tony to attempt to review individuals' responsibilities on the floor in order that the piecework could be implemented as smoothly as possible. We heard considerable conflicting evidence concerning the various exchanges and reactions in the meeting and the consequences. Ultimately it is of little assistance.

51. While much was made of the meeting by the owners we note that it was a meeting called by Tony to discuss production issues, not a meeting to deal with problems in his performance. He was confronted with the frustration felt by the owners and by Keith Crilly and he expressed his frustration with what he no doubt saw as an unwillingness to cooperate with him. We have little doubt that Tony understood that the D'Abbondanza's were unhappy, however the D'Abbondanza's also had an interest in keeping Tony employed. As Mary testified, they wanted to protect their investment. They were closer to having a piecework system implemented than they had ever been, and it would have been costly and time-consuming to start over yet again with someone new. Tony apologized for his behaviour on his return to each individual at the meeting. Keith testified he thought Tony was "stressed out" and needed a vacation.

52. In any event, Mary testified that on December 1 Tony promised to get the stock depart-

ment on piecework by March 1993 and that by March things had improved as the system was in place, and so Tony was not fired then. We note that in January 1993 the program representative that had spoken with Keith in October brought a consultant to meet with Mary and suggested he spend time with Tony. Tony was not aware of this visit, nor was the offer followed up by the owners.

53. While both D'Abbondanza's were adamant that Tony had done little, if anything expected of him, within a year of his arrival the stock room was on a piecework system and overall production had increased, according to Keith, from about 260 shirts a day to about 410 shirts per day, an increase of close to sixty percent. While Mary disputed these production numbers, there was no reason to disbelieve Keith. He testified that the numbers are posted on a bulletin board in the shop, although he also testified that it was thanks to Elizabeth, the new floorlady, that production had increased, not Tony (though Tony had hired her). Mary did agree however that by March 1993 production had increased significantly and she attributed that to being on piecework. While all the company witnesses were quick to hold Tony responsible for all the problems in the shop, they were not willing to attribute any part of these successes to his efforts.

54. The alleged precipitating event leading to Tony's termination was his failure to have the custom department on piecework by the time the D'Abbondanza's returned from vacation in May and his alleged admission that he couldn't handle the staff. The D'Abbondanza's assert that Tony had promised to have the custom department on piecework by their return. Tony denies having ever made such a promise. There is nothing in the documentation filed that supports a conclusion that Tony advised the owners that custom would be on piecework by their return. Exhibit 10 dated April 27, 1993 advised that Tony planned to start spending his entire day on the custom department with a goal of putting the employees on piecework. It sets out the engineering activities required to be completed. On a review of those activities it is difficult to understand how someone could conclude that the work would be completed and implemented within less than a month. Similarly to the stock department, the custom work involves a large number of operations. Tony testified that as he began the studies he realized that, because of the nature of custom work, there were more operations than originally anticipated. The D'Abbondanza's asserted that they told Tony that if custom was not so operating, he would be fired on their return from vacation on May 17, 1993.

55. Keith testified that he understood that Tony had been warned by the owners that if the stock department was not on piecework by mid-March he would be dismissed, but he was unaware of any such ultimatum as regards the custom or cutting departments. Keith testified that late in the day on May 17, 1993 Luigi told him to remind Tony that he was serious about getting rid of Tony if custom was not done. Keith let the remark pass and said nothing to Tony as he believed it to be a passing comment not to be taken seriously. We are not persuaded that Tony's job was in jeopardy on the basis of whether or not the custom department was put on piecework by May 17. If an ultimatum had been given, and putting custom on piecework was really the issue, why was he not fired immediately on their return on May 17? The response to this question was the assertion by the D'Abbondanza's that by then they were becoming suspicious. Luigi answered that he had to discuss it with his wife - they had to "clean house" and they needed more time to catch Tony in the act. We will return to this later in the decision.

56. While other matters of Tony's performance were gone over at length in the evidence, in many instances the circumstances were such that it was not possible to determine where the responsibility lay or whether the problems were more than expected day to day production problems. Exhibits 2, 7, and 9 were produced as evidence of mistakes made. They were not shown to Tony at the time.

57. In January the owners and Keith were upset with Tony because he presented them with a series of options with described advantages and disadvantages to each, for discussion concerning wage rates. Keith wanted Tony to choose an option and advance it, rather than merely presenting options. It is unclear how this reflects a performance problem as opposed to merely a differing management style.

58. Mary asserted in chief that Tony had unilaterally increased employees' wages without her approval. Exhibit 5 was produced in support of that assertion. According to Mary that form was to be filled out for any rate changes, including changes to piecework rates. According to Keith, Exhibit 5 only applied to new employees coming off probation who were entitled to an increase to the then guaranteed hourly rate if approved by Mary. That latter interpretation is consistent with the form itself which refers to an increase in the employee's guaranteed hourly wage.

59. It became clear in the evidence that the increases referred to regarding Tony were increases to an operator's wage as a result of different piecework rates being implemented. While rates no doubt changed with the revision and implementation of the piecework system, that would be expected. While a general assertion was made that some operator's rates jumped considerably over various weeks, no supporting documentation was provided from the payroll. Keith referred to one employee whose rate he said jumped from ninety-five percent to one-hundred and seventy percent over one week in late April or early May. We have no evidence of the circumstances. He did not tell Tony. He did tell the owners. The anomaly did not occur again.

60. While some anomalies may have been brought to Tony's attention at the time, the evidence does not support a conclusion that he was told that the owners considered them to be a unilateral increase to wages and inappropriate conduct on his part. It is more likely that with the implementation of the piecework system errors required correction and adjustments were warranted.

61. We note that Exhibit 17, a second letter to Tony from company counsel, asserts that Tony arbitrarily increased wages of those employees who indicated support for the union. In this letter, sent to Tony's counsel in the context of a wrongful dismissal action, Tony is identified by the company as being a key union organizer. The letter asserts improper conduct on Tony's part, including providing the union with confidential company information, and the assertion of his unilaterally increasing the wages of union supporters.

62. Mary testified that it was only after she saw the complaint filed in this proceeding that she linked Tony to the union's organizing campaign. The complaint makes reference in paragraph 4 of its particulars to a conversation between Luigi and Tony following the April 28 events. Because this was a conversation between management members only, the fact that it was pleaded in the union's complaint led Mary to conclude, she said, that Tony was a union organizer.

63. In cross-examination however, she was asked if prior to that she had been suspicious. Mary responded by saying that her "main problem was where Tony was taking my information" and then she agreed with the statement that what she could not believe before, she believed now, referring to her belief that Tony was involved in the union's campaign. This is consistent with Mary's evidence concerning the report of the investigators. While the nature of that report was not disclosed in evidence, the D'Abbondanza's agreed that the investigators had found no evidence of stealing in their short investigation. In chief, in response to the question, did she have any belief that Tony was involved in the organizing campaign, Mary testified she did not, that, "when the

detective came back and gave his report - I did not believe it". There can be little doubt that the investigator somehow tied Tony in with the union.

64. The D'Abbondanza's relied on their assertion that Tony had failed to report to them on May 17 on their return from vacation as part of their decision to fire him. They testified that his failure to report and his statement that he could not handle the employees was a kind of final straw. Luigi testified that they waited to see if he would report to them and that they met with him later in the afternoon. Tony was asked why he hadn't reported earlier.

65. The evidence about the conversation is contradictory. The D'Abbondanza's testified that they thought Tony would come to them to report that the custom department had started on piecework. We note that the D'Abbondanza's would have readily known that piecework in custom had not been implemented. Luigi testified that the fact that Tony spent the day taking videos for time studies made no sense - that it seemed Tony was just trying to impress him.

66. Tony testified that he thought the D'Abbondanza's were inquiring as to why he had not informed them of the union's activity on the Friday before. Tony (correctly) believed that they already knew so there was no need for him to report it. The D'Abbondanza's deny they were making any such inquiry. They testified that during the conversation Tony referred to the employees as liars and backstabbers. Mary testified she did not understand these remarks. Luigi testified that he thought that Tony was "trying to identify himself" in these terms "because of what was happening here". In that regard Luigi refers to his belief that Tony was stealing information from the company. It is difficult to understand why, if true, Tony would be risking that type of admission.

67. The D'Abbondanza's asserted that it was during this conversation that Tony stated he could not handle the employees and that it was an admission that confirmed to them that he was not capable of performing his supervisory functions. This statement if made, is difficult to reconcile in the context of a conversation supposedly concerning the implementation of piecework in the custom department. When asked initially in her cross-examination, Mary confirmed that she did not see a control problem in the shop - that the employees in the shop were supervised appropriately. We note too that that is primarily the floorlady's responsibility. Later when asked to then explain her concern over Tony's alleged remark on May 17, she eventually explained that by control she meant getting the operators on piecework. This undermines the assertion that supervision was an issue at all. In addition the reason that custom was not as yet on piecework was because the necessary studies had not been completed.

68. In addition to the alleged statement about a lack of control there is the alleged assertion about employees as "liars" and backstabbers". Tony denies making these remarks. If we were to accept Tony's evidence, there is no basis for the owners drawing the conclusion they asserted - that Tony was admitting an inability to properly supervise staff. However if we accept the evidence of the owners their stated concern is also not substantiated by their own evidence as we have noted.

69. The comments attributed to Tony by the owners are more consistent with Tony's assertion that he was being asked why he had not reported to them about the union. In this context, an assertion that he could not handle the employees and comments that employees were liars and backstabbers is more consistent with an attempt by Tony to assert that he was not responsible for the views or actions of ungrateful employees regarding the union. This is also consistent with his reaction to learning of the union's first visit in April.

70. The owners' denial that they were interested in discussing the union is also inconsistent

with Luigi's conduct on May 17 and other evidence. Luigi D'Abbondanza testified he had two conversations with Tony concerning the union - one after the leaflets were left on the cars in April and another after the union returned in May. Regardless of the contents of the April discussion, there is no real dispute that Luigi asked Tony early in the week of May 17 to find out the number of employees that wanted a union.

71. Luigi testified that if enough people were interested he would approach the union himself to see what it could offer. Tony testified that Luigi asked him to recover the envelopes from those employees who had not yet turned them in and that he refused to do so. Luigi denied this. He acknowledged that Tony had asked him the number of envelopes that he already had. Luigi testified that he would not tell Tony this as the employees had come to him in secret, although he could not explain why. Further, he had not counted the number he had. Luigi testified he asked Tony to speak to the employees as it would be inappropriate for him to do so; that the employees might be afraid of him, but not Tony.

72. While Luigi denied having said to Tony words to the effect that the number of envelopes was not important as the employee may have retained the membership card (contrary to Tony's evidence), the evidence is clear that Luigi was not a disinterested observer and that he was aware of the potential impact of his participation on the employees.

73. Throughout his evidence Luigi D'Abbondanza stated that the arrival of the union on the scene was viewed as a neutral if not positive event. In discussing the events of the week of May 17, he stated that matters of the union went in one ear and out the other as he was interested in trying to catch the thief in his workplace. He described how he thought that a union might help them better manage the shop as other shirt manufacturers who were already unionized had standardized rates. When asked to explain, he suggested that Royal Shirt could use the same standardized rates and thereby implement the piecework system that much faster. How this involved the presence of the union was not clear nor does it necessarily logically follow. Keith Crilly testified that he had told the D'Abbondanza's that having a union would not be such a bad thing in that they could then implement layoffs when there was downtime. He agreed however that the company had that option in any event and that in circumstances where work was slow in one area, the company's normal practice had been to reassign employees to other work.

74. Generally, the suggestion that the D'Abbondanza's would have been open to the arrival of the union is highly improbable in light of evidence concerning their management style and observing their demeanour over approximately four days of the hearing. This couple have built the company from the ground - working extremely hard. They have been and appear to continue to be successful, but are recently feeling the effects of the general economic climate and feel understandable concern. They employ a number of family members. They speak of the company as a family where events in employees' lives are shared and participation extends beyond the doors of the shop. No doubt that is true. However, the other aspect to that family existence is retention of a parental role in the workplace by the owners. The evidence is clear that they involve themselves in every aspect of the business. Part of their difficulty it seems, is that the operation has grown to a size where it is very difficult for them to be able to keep abreast of all matters. At the same time they are extremely reluctant to give up any role in the day to day management of the operation.

75. Tony was hired as industrial engineer and plant manager and it was one of the D'Abbondanza's complaints that he failed to manage the shop. From the outset the owners were second-guessing his decisions. It may be that Tony had not developed the skills of a plant manager but one wonders whether he would have been hired at all if the owners felt he would make and implement

decisions without consulting them first. There were many references in their evidence to “controlling” the employees.

76. Keith testified he felt that the D’Abbondanza’s often made decisions based on “emotional” rather than “business” reasons. This was referred to, for example, in the context of the outcome of the December 1, 1992 meeting with Tony; that Mary “let her heart decide”. While proffered for the purpose of suggesting that Tony received the benefit of the doubt and was retained even though they felt he was not performing his job, Mary acknowledged that they were close to implementing the piecework system and that it would be more costly to start over with someone new. We have no doubt that Mary is a kind-hearted and generous person. She has helped employees in many ways and, for example, has provided time off to employees to look for other work when that is in their mutual interest. However, she is also still very much concerned with her business and would defend it vigorously if she felt it threatened, precisely because it does represent family to her.

77. Luigi stated that he is sometimes not told of events because his family is concerned he will “have a heart attack” or that he will “scream”. This seemed a recognition, at least by others, of a tendency on his part to over-react to events. This also suggests that Luigi would not necessarily be the easiest person to work with. He was quick to react to Tony’s attempt in December to discuss production problems by saying he need not listen “to this garbage”. In discussing the annual review of wage rates in February 1993 and a suggestion by Mary and Tony to give a small percentage increase he stated he would “not give the employees a dime” unless he got something back, and that “if the employees did not like it they could quit”. This occurred in the context of two prior years of no increase in wages and an increase in production over the previous year of more than fifty percent. Luigi was quick to state in evidence that Tony would be lying to say he started with the company in March 1992 (a readily verifiable fact) which date was confirmed by Keith. While testifying is no doubt a trying experience for most, the manner in which Luigi gave evidence in response to relatively straightforward questions suggests he readily feels his authority challenged and is quick to respond in a way consistent with his view of his own self-interest.

78. We find it highly improbable that the owners viewed the union as anything but an intruder.

79. Ricardo Zurito’s letter of termination sets out two reasons for his termination; that the computer system for which he was responsible was not being used at full capacity, resulting in problems with outdated files and problems with markers, and being continuously late for work. The reply to the complaint adds three reasons; not following specific instructions by the owners resulting in unproductive time, and taking extremely lengthy periods to complete projects; and an allegation that Ricardo created a false company letter and forged a signature on it.

80. We heard evidence about the company’s concern that Ricardo had forged a false letter of employment. While at times it appeared to be raised as part of the reasons for his termination, the most that can be said, even accepting the owners’ evidence, is that as of May 20, 1993, Mary suspected that Ricardo had forged the letter. She did not make it part of the letter of termination - nor was it raised with Ricardo. Whether or not the employer would be entitled to take into account Ricardo’s conduct in support of a wrongful dismissal action is irrelevant to these proceedings. The issue before us is to assess the true reasons behind the decision to dismiss him from employment on May 20, 1993.

81. We were urged to disregard Ricardo’s evidence on the basis that his credibility was

affected by this conduct. Under the protection of both the Canada and Ontario *Evidence Acts*, Ricardo testified as to his involvement. Although other aspects of his evidence were exaggerated, where his evidence conflicts with Mr. D'Abbondanza and there is some support for that evidence, we have preferred the evidence of Ricardo Zurito.

82. Ricardo had been employed by the company for about five years at the time of his termination. Following university training in Mexico he immigrated to Canada and started working for Royal Shirt. He performed a number of jobs in the company acquiring greater responsibility over time. At the time of his termination his primary responsibilities were looking after the custom department and operating the Lectra machine.

83. The Lectra machine is a computerized system for making pattern markers, and plays an important part in the production process in terms of cost, output, and quality. It is also used in grading (creating the different sizes for one pattern). In producing a shirt the pattern pieces must be laid out on the fabric for cutting. In a manufacturing process the goal is to lay out of those pieces in such a way that the least amount of fabric is used (while accounting for fabric considerations such as stripes). Once laid out, a "marker" is created for a length of fabric, which then goes to the cutters. The cutters cut a very large number of layers of fabric from each marker. Those pattern pieces are then "bundled" and move to the operators for sewing.

84. The evidence concerning Ricardo's alleged performance problems came primarily from Luigi, as the two work very closely in this stage of production. Luigi spends much of his time working with patterns and markers. Although oriented to the Lectra system, Luigi does not have the same training as Ricardo in using the computerized equipment.

85. The primary complaints with Ricardo's performance were his alleged mistakes in the creation of the markers and an alleged unwillingness to follow Luigi's instructions. There was very little in the way of specific examples that included sufficient detail so as to try and determine whether there were mistakes and if so, whether Ricardo bore responsibility for them. Ricardo acknowledged that he had made some mistakes, and that he relied on Luigi's greater experience in creating the marker to help him. His role was to translate their efforts into a computer-produced marker rather than a manually-produced marker, and to continually search for ways to improve the layout. Luigi referred to one occasion where he asserted that Ricardo had given a marker to a cutter without it being checked and as a result of mistakes, a week's worth of work had been lost. He testified this occurred a couple of years ago. Ricardo started working on the Lectra machine in January 1992.

86. Luigi testified that every day they would fight - that he would tell Ricardo "to go right" and Ricardo "would go left". Were the circumstances truly as Luigi described we have considerable difficulty in understanding why action was not taken sooner. Luigi testified that he wanted to fire Ricardo a long time ago but could not because he did not want to revert to the old system of creating markers. There is no evidence to support a conclusion that Ricardo could not have been replaced. To the contrary, since his termination from employment the D'Abbondanza's daughter, Anita, has been making the markers apparently without complaint.

87. Similarly with respect to the allegations that Ricardo was continuously late for work and took too long to complete projects, we have difficulty understanding why, if true, action was not taken sooner, even in the absence of any formal disciplinary process. The latter assertion of taking too long to complete projects would seem to include the assertion in evidence that Ricardo worked a considerable amount of overtime. However, on being told at the outset of the week of May 10 not to work any overtime, he stopped. Had this been of such a concern earlier, it apparently could easily have been remedied.

88. Mary asserted that Ricardo was continuously late for work and that, particularly on May 17, 18 and 19, 1993, he was late and had left no work for the cutters, resulting in downtime to them. This assertion was raised as a form of culminating incident to the decision to terminate his employment that week. Time cards were entered for the purpose of showing that during the week of May 17, 1993, Ricardo punched in after 8:00 a.m.; and he was therefore late. The evidence is clear however that Ricardo did not have a particular start time. It varied from some time after 7:00 a.m. to as late as 8:30 a.m. The time cards, when looked at for the whole period made available, support this conclusion. Consequently, even if Mary had raised the issue of his start time with Ricardo on May 17, it would in all likelihood have been for the first time. To conclude otherwise would mean that Ricardo had openly defied instructions for a considerable period of time and no action had been taken. Also, given Ricardo's response to being told to stop overtime, we find it highly improbable that Mary raised his start time with him even on May 17 and that he continued to defy her.

89. Ricardo also denies that there was no work for the cutters on these days. Overall, we are inclined to prefer his evidence on this point. Ricardo testified that he tries to keep ahead of the cutters by a few day's to a week's worth of work, in order that this problem not arise. There was no other evidence to substantiate Mary's assertion.

90. Marie Brown's letter of termination sets out various reasons for her termination including her failure to perform satisfactorily as a receptionist, mistakes made in her role in the shipping department (including discussion on May 18 concerning performance problems), and continuing to make up invoices in defiance of instructions not to do so.

91. Marie was hired in January 1990 as receptionist. She had previously worked at the company through a temporary employment agency. In early 1993 she was moved to the shipping department because there were concerns about her conduct as receptionist - that she was too familiar and made inappropriate remarks to clients and suppliers.

92. Everyone agreed (whether they found it to be a positive or negative trait) that Marie was the kind of person who spoke her mind. In her evidence she was forthcoming about the problems in her performance at work, and the occasions on which these problems had been drawn to her attention. She freely acknowledged she felt that her move from reception to shipping had been a demotion even though it paid more money, and she agreed that she had told Mary that she was not happy in the shipping job.

93. The D'Abbondanza's asserted as well that Marie was insubordinate by refusing to follow instructions to stop creating invoices. In this regard we accept the evidence of Marie Brown. As receptionist, it was her responsibility to create invoices. When she was moved to the shipping area she trained the new receptionist to create custom invoices and stopped doing that work herself unless the receptionist had a problem. Keith Crilly acknowledged that by the end of February (some 3-4 weeks after she started) the new receptionist had started doing custom invoicing. However Marie continued to create invoices for the stock department and it was her evidence that it was not until Mary's return from vacation in May that Mary told her Sylvia would teach stock invoicing to the receptionist. Again, to accept the D'Abbondanza's evidence would require a conclusion that Marie repeatedly ignored their instruction to their knowledge. While the company may not have had any formal disciplinary system in place, if the matter was of real concern, some action, even in the absence of discipline, would likely have been taken.

94. The owners had legitimate concerns about the problems created by Marie's mistakes in

the shipping area, such as mixing up shipments between customers, sealing the boxes prior to them being checked, sending incorrect shipments, and the concerns raised by Holt Renfrew. Yet it did not appear that as of Tuesday, May 18, following her meeting with Marie, that Mary had formulated any decision to terminate her employment. Rather, it seemed she was hoping that Marie would find another job and offered her some time off to look for one. This is consistent with the way that Mary has dealt with employees in the past where there have been some concerns. In testifying about the letter given to employees on May 20, Mary agreed that she preferred to work out mutually agreeable arrangements so that an employee could move on and the company's concerns would be met. Prior to these occasions, as stated, Mary could not recall the last time that the company had fired someone for poor performance.

95. Between Tuesday May 18, and Friday May 21, the owners learned that Marie was voicing support for the union and that she had been discussing the union with Tony and Ricardo. She had refused to return the envelope to Luigi.

96. Having assessed the reasons for termination and the underlying basis for them, we now consider the evidence of suspicious behaviour and the D'Abbondanza's alleged concern that Ricardo and Tony were stealing information from the company with the intent to sell it or start their own business. We note that this evidence was led primarily to explain the timing of the decisions to terminate. However, at times the owners blurred the distinction between the reasons for the termination and the reasons for the timing of those decisions.

97. What was the nature of this suspicious behaviour? The evidence surrounding these issues causes us considerable concern about the apparent willingness of the owners to either fabricate events or severely exaggerate otherwise innocuous circumstances to make serious allegations of improper conduct which, in all respects, they admit they have been unable to prove. The employees involved deny having engaged in any such improper conduct.

98. Mary testified that the precipitating event had been the discovery of the electrical room door being left open. They were concerned that property could be removed from the premises through this back exit which was normally kept locked. It was in the vicinity of Ricardo's work area. It was not clear when this became an issue, although it was advanced as a sort of final straw. According to Mary it was reported to her by her daughter while on vacation. Luigi's evidence seemed to refer to an earlier time frame. Luigi testified that Ricardo started using the back door and that a neighbour told him Ricardo would leave a box near the garbage container to be picked up at night. This had never been followed up by the owners, nor was Ricardo questioned. No dates or other circumstances were identified and we did not hear from either the neighbour or the D'Abbondanza's daughter. Luigi testified he told Keith to keep an eye on the door. Keith testified he was unaware that there was any concern regarding the door. Luigi testified to one instance where, according to Luigi, he spoke to Ricardo who told him that the service person for the Lectra machine had used that exit. Apart from the assertion that this explanation was not to be believed, there was no evidence that anyone had ever seen Tony or Ricardo use the door or leave it open.

99. Other events, although not previously attracting particular attention, then became suspicious. In July 1992, Tony had asked an employee to make sample collars and cuffs in order to help familiarize the new floorlady. The samples had been missing for some time. Tony had also asked Ricardo to print out some patterns. Luigi and Mary asserted that they told Ricardo not to do this yet he kept printing them. While no specific occasions were identified clearly by the D'Abbondanza's, Ricardo recalled one occasion in 1992 when Tony asked him for certain patterns and Ricardo had provided them. In order to accept the D'Abbondanza's evidence it would be neces-

sary to conclude that Ricardo repeatedly and to their knowledge ignored their instructions. Also inherent in their assertions is the view that there would be no circumstance in which Tony would have a need to review patterns in the performance of his work, a proposition that is unlikely in the context of the implementation of a piecework system and the management of the shop. In the case of both the samples and the patterns, Tony was not questioned or confronted either at the time or at the time of his termination.

100. Also raised was the fact that Tony often took the computer home at night. All the witnesses agreed that it was common knowledge that Tony did so. Luigi testified that he had told Tony not to do so on many occasions but that Tony too, had, in essence, defied his orders. While Luigi may have raised concerns about the possibility of theft or damage to the computer while outside the shop it is unlikely in our view that if he had made it clear that he wanted the computer to remain on the premises that Tony would not have complied. On Saturday, May 15, Anita did advise Tony that Luigi had called and instructed her to tell him not to take the computer home anymore and while frustrated, Tony complied.

101. The D'Abbondanza's were also concerned that Tony kept the bag for the computer "locked", and they did not know what material or information he was carrying with him. It is unclear whether "locked" simply meant zippered, but at no time did they seek to inquire of the bag's contents. Reference was made and we heard evidence from Miriam concerning one occasion where Tony took a "blue diskette" home with him even though he was going on vacation. Miriam identified this as a suspicious incident and went so far as to assert that she believed he was taking the disc to the United States with him in order to sell it. In her own words this occurred in circumstances where Tony had offered to drive her home, had indicated he had forgotten something, returned with the disc and did not hide it. She agreed that Tony would have believed that she would tell the owners about anything that was going on. She did not raise a concern with the D'Abbondanza's at the time.

102. The disappearance of a pair of Luigi's scissors in 1992 was also taken by Mary as evidence of suspicious conduct on Tony's part. There was no evidence connecting any employee with the event. She also asserted that she had heard a rumour that Tony was working elsewhere. There was no evidence to support either the rumour or the assertion.

103. Luigi testified in chief that Tony had purchased shirts from the company (a usual occurrence) but then sought to exchange shirts that were not his size; suggesting that Tony had stolen other shirts and assuming that all the shirts he had purchased were for himself. In cross-examination he then variously asserted that from Christmas 1992 to April 1993 Tony had bought three shirts and returned four or six, and that Ida had brought this to his attention. He suggested it happened as many as five times. There was no evidence to support these assertions.

104. When asked if this conduct was not proof enough of improper behaviour to warrant Tony's termination from employment, Luigi responded that he wanted to catch Tony in the act, that otherwise Tony could have made some excuse. Yet in May, Tony was fired it seems partly on the basis of mere suspicion.

105. The company keeps a file box of cards containing employee information. It is stored in a locked cabinet in Keith's office. Tony had told Keith in January or February 1993 that he was inputting the information onto the computer. Keith did not see that as any breach of trust on Tony's part at the time. In early May, according to Keith, Tony asked for and was given the box for this purpose. Keith then needed the cards in order to draft a letter. Ida D'Abbondanza went to retrieve the box from Tony's office and found only those cards for ex-employees. Keith testified that Tony told him he had taken the others home to work on. Tony testified they were in his office.

According to Keith, the cards were returned to him the next day. In asserting that this constituted suspicious behaviour, the D'Abbondanza's challenged this use of Tony's time, suggesting that as it was a clerical function, Tony ought not to have been spending his time on it, particularly when he had committed to spending all of his time to getting custom on piecework. Mary learned of this incident on her return from vacation; that "it came up in discussion" while they were "trying to figure out what was going on". Mary could not recall whether it was Keith or Ida who told her of it. Keith was not aware at the hearing that the owners were accusing the employees of dishonesty. Ida D'Abbondanza was the only other person, apart from Tony, apparently aware of the incident.

106. The discrepancy in the evidence between Keith's assertion that Tony told him the cards were at home and were brought in the next day and Tony's assertion that they were in his office is troubling. We are inclined to prefer Keith's evidence in this regard. However, the suspicious nature of that conduct remains to be examined.

107. When asked to explain why Ricardo was fired, Luigi stated that he was not doing his job, there were things missing, and there were rumours that he was taking patterns home, so he decided it was time to clean house. He also referred to having spies who told him that Ricardo had a customer list and that he had had Ricardo under suspicion for a couple of years.

108. There was no evidence to connect Ricardo with things missing or that he was taking patterns home. In support of the assertion that Ricardo was collecting company information, a photocopy of a notebook that Ricardo kept on his desk was entered as Exhibit 14. It contains for example names of customers, phone numbers, shirt styles ordered and phone numbers of other employees. All of the information contained in the book is information that Ricardo would make use of in his work, particularly with respect to overseeing the work of the custom department. It was left in full view on his desk. The code information found in it was available in two other unlocked locations in the office. On this evidence, the conclusion that Ricardo was collecting company information for some improper purpose is one that this panel is not prepared to make.

109. Luigi testified in cross-examination that on his return from vacation he had tried to pull up a marker on the computer and found that the codes had been changed and that this made him very suspicious. He originally thought it was his own mistake. It then became apparent that Luigi had known that the codes had been changed for "a long time".

110. Keith and Mary testified that Ricardo had changed stock numbers prior to June 1992 and that it had wreaked havoc in other departments. Keith had asked Ricardo about it, who told him it made things easier for Ricardo, and Keith had not followed it up. At the time, Ricardo was not told to revert to the old numbers and these changed ones were still being used at the time of the hearing.

111. Much of this evidence speaks to the exaggerated nature of the performance issues now being raised and to the credibility of the owners concerning their alleged suspicions and the reasons for them.

112. To the extent that Miriam testified to other examples of what she felt were suspicious behaviour (for example, the fact that when he first arrived, Tony had requested that a lock be put on the office door containing the computer), or to the extent that Miriam and Keith Crilly were asked to provide their views concerning Tony's performance, and those matters were not relied on by the D'Abbondanza's, they are irrelevant here.

113. While the D'Abbondanza's asserted at various times that their suspicions were such that they had decided prior to and during their vacation to take some action, Mary also testified that it

was on their return from vacation that it all started coming together; that events that had not previously been suspicious, became so. She referred to the “pieces of the puzzle” starting to fit.

114. Luigi asserted that he had been suspicious of both Tony and Ricardo for some time. When asked why he did not act on his suspicions earlier, he answered that he wanted to catch the employees in the act. Then when asked why he had acted on only his suspicions in May, he answered that they had been waiting and waiting until one day they had to make a decision. This prompts the question of why they felt they had to make the decision that particular week. The D’Abbondanza’s testified that it was as a result of discussions and decisions made over their vacation. If that were the case, why wait until later in the week to fire the employees? How can that be reconciled with the evidence that on the Tuesday evening they came to believe Tony was stealing company information and hired the investigators. When asked why the employees were fired in two days, Mary answered that it had not been two days, but “months and months of agony”. More telling perhaps is Mary’s comment at the end of her examination that having taken a week to celebrate, on her return she felt like “the world was collapsing”. The more reasonable and probable explanation is that over the course of the weekend they discussed the turn of events with other family members employed and became suspicious (even if they did not as yet fully believe), that these employees were involved in, or were supporting the union’s campaign. While counsel for the company was correct in arguing that timing, in and of itself, should not immediately lead to a conclusion that the Act had been violated, the evidence of conduct here does not at all suggest an unrelated coincidence to the timing of the union’s activities.

115. At the hearing, although not relied on or referred to by Mary D’Abbondanza, and not referred to in the pleadings or in her letter of termination, Luigi included in his reasons for terminating Marie Brown’s employment that in his view she was working with Tony and Ricardo to steal information from the company. In his view, Marie, in shipping, could help Ricardo remove property from the shop. On that factor, arguably his sister would also be suspect. Did the fact that she was making mistakes make her conduct more suspicious? These speculations are improbable and there was no evidence to support the assertion. The evidence that ties these employees together is the fact of their lunch together on May 19. The evidence suggests that the connection between Marie, Tony and Ricardo arose for Luigi because he believed that Marie was supporting the union and he suspected, if not believed, that Tony and Ricardo were also supporting the union.

116. In discussing these concerns of alleged suspicious behaviour, Mary testified that the patterns were her main concern, in that they could be used in order to compete with the company for business. In assessing the validity of the company’s assertion that the employees were involved in some kind of conspiracy to steal company information, it is information concerning the company’s product and customers that would be of primary concern. With that information a competitor could attempt to offer the same or similar product at competitive pricing to that same pool of buyers. There can be no doubt that the theft of such information would be a serious concern to any manufacturer.

117. In attempting to assess the owners’ thinking, it is instructive then to review Exhibit 16 which Mary agreed she instructed be sent to Tony. It is dated May 20, 1993 and contains a specific allegation that Tony has removed a list of employees, together with personal information, from the premises. It does not specifically assert the removal of other company information. The letter goes on to say that “We have suspicions that you have removed these documents for ulterior motives...” and requests the return of the list immediately together with any other lists of customers or company items. It further instructs Tony not to divulge that information to any third party. It does not identify the suspected ulterior motive. It does however appear to place concern over employee lists above any concern for customer lists or patterns.

118. With the exception of the forged signature, at no time even up to the hearing, were the D'Abbondanza's able to confirm any of their suspicions of improper conduct. They did hire the investigators but then limited the investigation to one day, Wednesday, May 19. They did not explain how their suspicions came to link Tony and Ricardo as working together to steal information. In the absence of any confirmation and without confronting the employees, they decided to fire them. Mary referred to having to start over and put an end to the whole thing.

119. While the D'Abbondanza's probably did feel that a conspiracy was underway at that point, what was the nature of that conspiracy to their mind? They were concerned about the possibility of a list of employees being disclosed to a third party. They did not explain why that information would be of use to a competitor. However, that is the kind of information that is valuable to a union in an organizing drive, as it provides them with a means of direct access to employees in order to attempt to persuade them to join.

120. Of what effect is the fact that there is no evidence that these employees were union organizers? Certainly in cases where employees are alleged to have been fired for performance reasons, a union will often lead evidence to establish that the individual was involved with the union and that the employer was aware of that, in asserting that the reason of poor performance, even if established, was not the only reason for the termination (see, for example, the comments in *Speedex Company*, [1981] OLRB Rep. Dec. 1829, at paragraph 13).

121. We do not have that kind of evidence and this case is no doubt somewhat different in that respect. The issue however is to determine the employer's real reasons for termination. If an employer suspects or believes that an employee is engaging in union activity and acts pursuant to that view, the fact that the employee was not so engaged is irrelevant. In addition to reasons of performance, the owners made their decisions to terminate employment in the context of "suspicious behaviour". While the letters of termination do not take this behaviour into account as part of their reasons, in Luigi's evidence particularly, the owners had difficulty at different times in separating that behaviour from their reasons. It was also taken into account in trying to explain the timing of the decisions, and while that timing was explained as a factor of discussing long-standing problems over their vacation, the evidence is not consistent with that conclusion. There has been no adequate explanation as to how Tony and Ricardo came to be linked in the employers' minds, and we have reviewed the addition of Marie Brown to the allegations of suspicious conduct by Luigi. The evidence concerning many of the issues of performance has been highly exaggerated or simply not made out, leaving open the conclusion that they were not the real or exclusive reasons. The coincidence of timing of the terminations with the union's reappearance, the actions of Luigi D'Abbondanza in seeking the return of the envelopes, the hiring of investigators but the short-circuiting of the investigation, is then too strong to ignore. The most reasonable and probable conclusion is that the owners suspected, if not believed, that these employees were involved in or were supporting the union and that that formed at least part of their reasons for terminating their employment.

122. We are satisfied therefore that the company violated sections 65, 67, and 71 of the *Labour Relations Act* in terminating the employment of Tony Bellisario, Ricardo Zurito, and Marie Brown and by Luigi D'Abbondanza's conduct in attempting to secure the return of the envelopes from employees. We need not make any further findings in the circumstances.

123. The union argues that by virtue of the company's actions, the true wishes of the employ-

ees are unlikely to be ascertained, and it therefore seeks to be certified pursuant to section 9.2 of the Act. That section states:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

124. The section sets up two criteria that must be met in order for this remedial provision to apply. Having concluded that the company has violated the Act, it remains to be determined whether or not the true wishes of the employees are likely to be ascertained in the face of those violations.

125. Until the recent amendments to the Act, a third criteria existed as well, that being an assessment of whether or not the trade union had membership support adequate for collective bargaining. The employer argued that as a result of the deletion of that criteria our approach to the application of section 9.2 ought to be, in essence, more restrictive. Otherwise a trade union might be certified when employees did not wish one, and counsel pointed out that in this case only one membership card had been filed. Counsel argued that to take the conduct in issue and conclude that the true wishes of the employees could not now be ascertained carried with it an "extra leap of faith", that panels previously were not required to make because of the additional requirement for adequate membership support. The union argued that this approach would have the effect of inappropriately reintroducing the criteria of adequate membership support.

126. The legislative and policy background to this section of the Act are set out in *Trulite Industries Limited*, [1983] OLRB Rep. May 821 starting at paragraph 19. Some of the comments concerning the factual underpinnings to that case may also have some application in the circumstances of this case. The Board wrote:

19. Certification without a vote under section 8 [the predecessor provision] was designed as a deterrent to illegal employer interference in union organizing campaigns, and a device to provide a meaningful remedy in those cases where the employer's interference undermines his employees' statutory rights, and, in addition, precludes the Board from undertaking its usual determination of employee wishes through a representation vote or an assessment of the union's membership evidence. In other words, section 8 is a kind of "second best" solution, to be applied where the employer's misconduct not only frustrates the union's organizing drive, but also impairs the Board's ability to ascertain whether the majority of the employees do or do not wish to be represented by a union. In order for a union to be certified under section 8 of the Act, the Board must be satisfied that:

1. the respondent employer has contravened the Act;
2. the contravention is of such nature that the true wishes of the employees are not likely to be ascertained in a representation vote or otherwise; and
3. that the applicant union has membership support adequate for collective bargaining.

20. There is no doubt that the respondent's conduct in this case involves serious contraventions of the Act even though, to some extent, its actions are understandable, and, in the Board's experience not all that unusual in today's troubled times. Peter Alexander testified that he and his partner were deeply concerned about the prospect of dealing with a union, and like many other small businesses in recent years, they have been experiencing severe financial difficulties. A collective bargaining relationship was regarded as but one more burden which they feared would destroy their business. Alexander was also convinced that support for the union was restricted to a small vocal minority of new employees whose presence had disrupted the "fam-

ily" atmosphere which he had sought to maintain with the employees since the company was formed in 1975 - hence his decision to fire the "agitators". Indeed, Alexander candidly admits that his actions were improper and an overreaction attributable to the financial pressures which he had been under for some months; and we have no reason to doubt the reality of those pressures. The four discharged employees were eventually reinstated pursuant to a without prejudice settlement of their section 89 complaint.

21. The scenario present in this case is not a new one, and the Board is not unsympathetic to the situation of the small businessman pressed by creditors and high interest rates, and anxious about the very survival of his business. Having no direct experience with collective bargaining and fearing its consequences, such employers sometimes do overreact and interfere with their employees' statutory rights - particularly where, as here, they act precipitately and without professional advice. But our appreciation of the context does not obscure the gravity of what has happened here. In his remarks on March 23rd, Mr. McInnes told the employees that their jobs would be jeopardized if they opted for trade union representation, that the plant would close, that the business would be "killed", and that certain benefits or opportunities then in place (e.g., overtime) would no longer be available. The very next day four employees identified as supporters of the union were summoned before the co-owner of the company and summarily discharged. It is hardly surprising that, thereafter, there was little enthusiasm or support for the union even among persons who had previously expressed considerable interest. The employer has indicated in the most graphic way possible that employees who support the union do so at the risk of their jobs. We do not think this "message" is likely to be forgotten easily.

22. We have found that the respondent has contravened the Act; and if ever there was a case where the true wishes of the employees are not likely to be ascertained by the conventional means now available, this appears to be it. But does the applicant have "membership support adequate for the purposes of collective bargaining"? This phrase was added to section 8 (then section 7(a)) in 1975 in place of the requirement that the union have the support of more than fifty per cent of the employees in the bargaining unit. It is clear, therefore, that the phrase "membership support adequate for collective bargaining" is not simply a reference to majority support. Even more striking is the removal of the reference to a representation vote which appeared in the statutory predecessor of section 8. By doing so, the Legislature appears to have contemplated the possible application of the new section 8, even where the applicant's membership support falls below the minimum level required for entitlement to a representation vote (see *Lorain Products*, [1977] OLRB Rep. Nov. 734). In other words, the section can now apply to situations where the employer's illegal response is so massive and so early as to prevent a trade union from ever attaining the level of support needed for a representation vote.

23. That is what has happened here. Had it not been for the unlawful interference of the respondent, the applicant might well have garnered at least the thirty-five per cent support necessary for the taking of a pre-hearing representation vote. As it is, the applicant obtained the support of about ten employees on March 22nd - 23rd, but none after the captive audience speech of March 23rd, and the discharges of March 24th. The fact that the union gained the support of about 30% of the potential unit and that a number of employees were interested enough to make their way to the union hall to sign cards lends credence to the evidence of the applicant's witnesses that there was considerable interest in trade union representation, which might have matured had it not been stifled.

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) 1 Can. L.R.B.R. 13, the Board observed at page 20:

...Certification without a vote...creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct....However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal

means...I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

...The Board must not be afraid to use it [the certification remedy] when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union...

26. These policy considerations are clearly reflected in the present application. Some thirty per cent of the employees in the bargaining unit signed membership cards on March 22nd - 23rd and, according to the evidence of the union, a number of others had expressed interest. But the employer's speech on March 23rd and its discharge of four union supporters on March 24th would obviously dissuade any reasonable employee from signifying support for the union lest such support be communicated to the employer and result in the same kind of reprisals visited upon Pamenter, Mullen, Briceland and Edmindson. The obligation of the Board to make this admittedly somewhat speculative assessment about the depth of the union's support only arises because the employer had intentionally destroyed the more reliable and conventional means of ascertaining employee wishes.

127. Under that section, the second criteria required an assessment of the effects of illegal employer conduct on employees' ability to freely express their views, and applied so as to disentitle an employer from benefiting from its illegal conduct. There was a recognition at the same time, that it would be undesirable for employees to have a union which they really did not want. The third criteria acted as a measure, albeit as noted a speculative one, of this concern about the depth of the union's support. (See the discussion at paragraphs 20-21 of *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 concerning this exercise of assessing whether or not the trade union had membership support adequate for collective bargaining).

128. As paragraph 22 from *Trulite Industries Limited*, *supra*, describes, there was legislative recognition that the earlier there is improper employer interference in a union organizing campaign, the more difficult it often is for a union to be able to acquire the necessary levels of membership support. As a consequence, the required level of membership support for the application of this section has declined. With the recent amendments to the Act, it has been eliminated. The employer argued that as a result, the employees' right to freely choose whether they want a union to represent them or not has not been given meaning. If the union does not have the support of the employees, it may face an application to terminate its bargaining rights. Whether or not the entire exercise, even in the presence of first contract arbitration, ultimately proves to be a costly one (both financially and in other ways) for the union, the employer, and the employees remains to be seen in each case. However, there can be little doubt that the effect of the amendment is to make the level of membership support irrelevant in determining whether or not a union is entitled to be certified pursuant to section 9.2, and that there is, in effect, a broader disincentive to employers to engage in illegal conduct such that the true wishes of the employees' are not likely to be ascertained. However, we do not view the approach to the consideration of the remaining criteria to have been changed as a result of the amendment.

129. Are the true wishes of these employees unlikely to be ascertained as a result of the employer's illegal conduct? In submissions, while cases were referred to, neither party specifically addressed the evidence in support of their opposing views.

130. There are a number of conflicting and troubling factors evident in the circumstances of this case. Many are a result of the owners' varying justifications for their decisions to terminate, and their explanation of the timing of those decisions. The effect on employees must be viewed from the perspective of employees, both in terms of what information they would likely be privy to, and the conclusions that they are likely to draw from that information.

131. In assessing this question, the conduct of Luigi D'Abbondanza causes us great concern. Requiring the return of the union envelope is direct interference with the employees' rights, and includes elements of both coercion and threat. It is also direct interference in the union's campaign. What better way to stop that campaign than by ensuring that the employees do not have the means to join the union, and, at the same time, send a message to the employees that the employer does not want the union, and does not trust or want the employees to make that decision on their own. That threat was heard and understood. It is clear that a considerable number of employees were present during the morning of May 17 and gave him their envelopes, and that a number of employees were sufficiently concerned that they felt obliged to follow up, to bring their envelopes to him so that he knew that they had not sent in the card or were supporting the union.

132. What effect would the terminations have? In circumstances where these employees were known to be union supporters, fired directly on the heels of the union's reappearance (which for most employees would likely be understood as its arrival, given the events of April 28), in light of Luigi D'Abbondanza's conduct in connection with the return of the envelopes, we have little doubt that the message the employees would understand was that if you vote for, or support the union, you will be risking your job security, and that in those circumstances there would be little question of the appropriateness of the application of section 9.2. (See *Di-Al Construction Limited*, [1983] OLRB Rep. Mar. 356, at page 360; *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027; *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299; and the cases cited therein).

133. What is unusual in this case is that employees might be less likely to connect Tony's termination from employment to anything concerning the union because he was a member of management. There had also not been any prior union activity by employees in the workplace as the campaign was in its infancy. Marie had been vocal. It is reasonable to conclude that some employees would likely have been aware of her views, as she had expressed them in the doughnut shop and she had refused Luigi's request to return the envelope.

134. It could be argued that the employees might have believed that Tony was fired because of his failure to implement piecework in custom, that Ricardo was fired because he had forged a signature on a company document, and that Marie was fired because of the problems with the Holt Renfrew account. These are the strongest assertions that can be made by the employer. Yet those assertions were either not made at the time of termination, were only made in part, or were exaggerated in their conclusion. Assuming that the employees' understanding of the reasons for termination are relevant in the absence of clear union involvement, we have no evidence that reasons for termination were given to the employees. If employees understood those reasons to be as described in this proceeding, they were, at best, fraught with inconsistencies, and occurred in the context of unsubstantiated "suspicious behaviour" that is dealt with by the company only coincident with the union's arrival.

135. While there may have been confusion in employees' minds concerning the reasons for the three terminations, there would be no doubt that the week of May 17 was highly unusual in the

company's experience. The shop was quiet on the Monday, the Thursday, and early the following week. Following Monday's events, two employees were escorted off the premises on Thursday and shortly thereafter the owners convened a meeting of employees. Employees were told that the employer did not think there was a need for a union, and while there is reference to the employees' choice in the matter, there is a mixed message arising from the comments about not firing employees for poor performance. The following day an employee is fired allegedly for poor performance; an employee who has refused to turn in her envelope.

136. It is also clear that the owners now believe and assert that Tony was a key union organizer. While they assert this in defence of the wrongful dismissal action, Mary testified that she had discussed Tony's union role with some employees. It was from these conversations that Mary drew the conclusion that Tony was arbitrarily increasing the wages of employees supportive of the union. (Some of these individuals allegedly received higher earnings as a result of the piecework system, although Mary agreed that she did not do a comprehensive comparison with other employees to see how other earnings had been affected).

137. At least Ida, Anita, Miriam, and an employee named Lavinia are aware of the connection that the D'Abbondanza's have made between the union and Tony. They are also aware that the D'Abbondanzas linked Ricardo and Tony together as engaging in suspicious behaviour. Following the terminations, Miriam and Anita searched for anything that might be missing. It is a relatively small workplace. While we are hard-pressed to accept that there is the level of rumour-mongering suggested by much of the owners' evidence, we think it is reasonable to conclude, given the family, cultural, and social attachments, that there is a considerable "grapevine" in the shop. It is, we believe, reasonable to conclude that employees would be aware of this activity and the reasons for it. While the employer asserts Tony's connection to the union for reasons of breach of trust, we think it unlikely that employees would appreciate such a distinction. Rather, they are likely to assume that the same view of union activity and consequences would apply to them as well, particularly in light of the connection and consequences to Ricardo and Marie.

138. On balance, and particularly in light of Luigi's conduct early in the week of May 17, we are persuaded that the true wishes of the employees are not likely to be ascertained, and that it is appropriate to apply section 9.2 in the circumstances and certify the applicant.

139. Providing remedies other than certification, would not in our view alleviate the effect of the unfair labour practices on the employees' ability to freely express their choice. Tony would be reinstated to a position in the bargaining unit. In this regard, we adopt the reasoning in *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751. This might well be interpreted by employees as a demotion. A posting and access to the employees by the union may not overcome the powerful influence that Luigi appears to be able to exercise over employees, particularly in circumstances where the union has been deprived of the opportunity to build any base of support because of the employer's very early and serious interference in the campaign.

140. Therefore, by way of remedy, we hereby:

- 1) direct the responding party to make an offer of employment to Tony Bellisario to a position in the bargaining unit described in point 5 herein. On written notice of the offer, Mr. Bellisario is to have ten days from the date of the offer in which to accept or reject the offer. Whether or not such offer is accepted, the responding party is ordered to compensate Tony Bellisario for all wages and other bene-

fits lost, from the date of his termination to the date of his reinstatement or to his declining of the offer of employment, subject to the usual principles of mitigation.

- 2) direct the responding party to reinstate Ricardo Zurito and Marie Brown, with full compensation for wages and benefits lost, subject to the usual principles of mitigation.
- 3) direct the responding party to post the notice attached as Appendix A in conspicuous places in the workplace for a period of 60 days. The responding party is to make every reasonable effort to ensure that the notice is not defaced or obscured in any way.
- 4) direct that representatives of the applicant be allowed to convene a meeting of employees in the bargaining unit, in the absence of members of management, for a period of not more than two hours, on company premises during normal working hours.
- 5) certify the applicant for the bargaining unit agreed to between the parties, described as: all employees of Royal Shirt Company Limited in the City of Vaughan, save and except supervisor, persons above the rank of supervisor, office and sales staff.
- 6) direct the responding party to provide to the applicant a list of names of all employees in the bargaining unit, together with their addresses and phone numbers. We note that this is information to which the union would now be entitled to in the context of negotiations.

141. We remain seized concerning any matter arising out of these remedial orders and directions.

DECISION OF BOARD MEMBER W. N. Fraser; November 12, 1993

1. I agree with the facts as presented.
 2. I agree that it is appropriate to apply section 9.2 and certify the applicant.
 3. I do not agree that Tony Bellisario, the Industrial Engineer and Plant Manager and clearly a member of management, should be offered employment as a member of the bargaining unit.
 4. I agree with the remedy directed with respect to Ricardo Zurito and Marie Brown.
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Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT ROYAL SHIRT COMPANY LIMITED VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING ANTHONY BELLISARIO, RICARDO ZURITO AND MARIE BROWN FROM THEIR EMPLOYMENT IN MAY, 1993, AND BY SEEKING THE RETURN OF MATERIALS PROVIDED TO YOU BY THE UNION. THE ONTARIO LABOUR RELATIONS BOARD FURTHER CONCLUDED THAT AS A RESULT OF THESE VIOLATIONS, THE TRUE WISHES OF THE EMPLOYEES WERE NOT LIKELY TO BE ASCERTAINED, AND THE ONTARIO LABOUR RELATIONS BOARD CERTIFIED THE UNION AS BARGAINING AGENT FOR THE GROUP OF EMPLOYEES DESCRIBED AS:

ALL EMPLOYEES OF ROYAL SHIRT COMPANY LIMITED IN THE CITY OF VAUGHAN, SAVE AND EXCEPT SUPERVISOR, PERSONS ABOVE THE RANK OF SUPERVISOR, OFFICE AND SALES STAFF.

THE ONTARIO LABOUR RELATIONS BOARD HAS ORDERED THE COMPANY TO REINSTATE AND/OR COMPENSATE THE EMPLOYEES WHO WERE DISCHARGED AND TO ALLOW THE UNION TO HAVE A MEETING WITH EMPLOYEES IN THE BARGAINING UNIT DURING NORMAL WORKING HOURS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES:

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION:

TO ACT TOGETHER FOR COLLECTIVE BARGAINING:

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

ROYAL SHIRT COMPANY LIMITED

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 12TH day of NOVEMBER, 1993

1527-93-U William Hodgskiss, Applicant v. The Brick Warehouse Corporation, Responding Party

Discharge - Evidence - Just Cause - Unfair Labour Practice - Employee alleging discharge without just cause contrary to section 81.2 of the Act - Employer alleging that discharge justified in view of culminating incident - Board permitting employer to rely on prior employment record where employer prepared to prove misconduct making up that record - Board finding discharge penalty just and reasonable in circumstances - Application dismissed

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Robert McKay*, *William Hodgskiss* and *Paul Kessig* for the applicant; *Barbara G. Humphrey*, *Jeff Silver*, *Barton Gray* and *Mike Webber* for the responding party.

DECISION OF THE BOARD; November 16, 1993

1. This is an application pursuant to section 91 of the *Labour Relations Act* alleging that the responding party has breached section 81.2 of the Act. 81.2 states:

81.2-(1) No employer, employers' organization or person acting on behalf of either shall discharge or discipline an employee without just cause if,

- (a) a trade union is certified as the employee's bargaining agent or the employer has voluntarily recognized the trade union as the employee's bargaining agent; and
- (b) no first collective agreement has been settled.

(1.1) If the Board determines that an employer has imposed a penalty on an employee for cause, the Board may substitute such lesser penalty as it considers just and reasonable in all the circumstances.

(2) If the employee is discharged during a probationary period described in the employment contract between the employer and the employee, the Board may apply a lesser standard for discharging the employee.

2. The parties are in agreement that the application is timely.

3. The Brick Warehouse Corporation ("Brick") is a retail appliance and furniture store in the Province of Ontario which employs persons as commission salespersons, delivery drivers, and office and clerical staff. The stores' hours of operation are generally seven days a week, from early morning to late evening.

4. The applicant, William Hodgskiss commenced employment with the Brick in the City of Burlington as a commission salesperson, a position in the bargaining unit, on October 15, 1992.

5. At the Burlington location, there are two main departments: audio-visual equipment and furniture. Mr. Hodgskiss worked in the furniture department. In addition to commission salespersons, there are also floor managers to whom the salespersons can turn if they are in need of assistance. The salespersons report to Barton Gray, the sales manager, who reports to Jeff Silver, the store manager.

6. New sales staff attend a two-week training session. During this period employees are

advised of the company's values and policies, including its policy with respect to discipline. They are advised of the Brick's seven steps of selling. Two to three days are spent on product knowledge and a similar period is spent on the proper completion of paperwork (invoices and financing arrangements). Although Mr. Hodgskiss suggested that he only received one half day of training with respect to paperwork, the Board prefers the evidence of Mr. Gray and Mr. Schweden on this point and finds that Mr. Hodgskiss received the regular training.

7. The job of a commission salesperson involves meeting and greeting customers, advising them about products and, if a sale is made, preparing an invoice concerning the sale. The invoice, which plays a key role in this complaint, is an essential document in the operation of the Brick.

8. The salesperson is responsible for the proper completion of the invoice. On it the salesperson records the name and address of the customer, the date of delivery or pickup, the store code for the product being purchased, the English language description of the product being purchased, the price of the product and the method of payment. It is the responsibility of the salesperson to total all items properly, add the applicable delivery charge and taxes, and deduct the deposit. It is also the responsibility of the salesperson to obtain authorization for all credit card purchases. Approximately sixty per cent of sales at the Brick are done through Brick card financing. In that case, before delivering any product to the customer, the Brick requires five banking days in order to obtain approval from its financial institution to authorize an extension of credit to the customer for the value of the goods purchased.

9. Improper completion of an invoice can cause serious problems. Mistakes can result in delivery of the wrong product or delayed delivery to the customer. If prices are not totalled correctly, or delivery charges or taxes are not properly included in the total, the Brick may have to absorb those costs. If financing approval is not arranged appropriately, the Brick would find itself in the position of either delivering furniture to a customer without a proper guarantee of payment, or not delivering the product at the time or on the terms promised by the salesperson. Either result is unsatisfactory.

10. During his approximately nine months of employment at the Brick, Mr. Hodgskiss received six verbal warnings and three written warnings. He was also involved in two further incidents on or about July 15, 1993. The warnings related to tardiness, low sales volume and improper completion of invoices.

11. The sales manager, Mr. Barton Gray, was involved in all of the above disciplinary action. He described the Brick's policy with respect to discipline as follows. Apart from theft, which might result in instant termination, the following pattern of discipline was used: two verbal warnings, two written warnings and termination. Alternatively, a one day suspension could be substituted for the second written warning. He explained that new employees were advised of this pattern during their training session.

12. Mr. Barton further explained that it was his practice in imposing discipline to discuss the problem with the employee, to explain the nature of the discipline being imposed, to offer advice and instruction on how to avoid similar problems in the future, and to review the entire range of disciplinary action which would follow in the case of a similar occurrence. He testified that he followed this process with Mr. Hodgskiss.

13. The Board will now review each of the disciplinary actions taken against Mr. Hodgskiss in chronological order.

14. On December 9, 1992, Mr. Hodgskiss was given a verbal warning for repeated tardiness.

15. On January 8, 1993, Mr. Hodgskiss was given a verbal warning for improper completion of invoices. The nature of the errors were not recorded on Mr. Hodgskiss' file.

16. On January 9, Mr. Hodgskiss received a second verbal warning for tardiness. On January 27, he received a written warning for tardiness. On February 13, he received a second written warning for tardiness. Although he attempted to explain the reason for his lateness, Mr. Barton did not accept his excuse and he was disciplined anyway. In accordance with the procedure described by Mr. Barton, Mr. Hodgskiss was advised that the next occurrence of tardiness would result in termination. A thirty day limit was imposed as a period for no late shifts. Mr. Hodgskiss was not late during the next thirty days.

17. In April Mr. Hodgskiss received a second verbal warning for failure to complete invoices properly. Three invoices were introduced as evidence at the hearing to indicate the nature of the errors. On the first invoice, Mr. Hodgskiss had set the date for delivery earlier than the date on which it could actually be delivered by the Brick. As a result the product was delivered to the customer later than the promised date. It should be noted that the Brick places in prominent locations the dates on which products can be delivered, depending on the type of payment. Therefore, there is no reason why a salesperson would not be able to determine the proper date of delivery.

18. On the second invoice, there were various errors. Mr. Hodgskiss failed to include a delivery charge, resulting in the company having to absorb the delivery cost. There was also an addition error and Mr. Hodgskiss had again set the delivery date too early for the Brick to approve financing to the customer, resulting in the delivery being delayed.

19. The third invoice contained a minor error in that Mr. Hodgskiss had indicated two different and conflicting types of payment. The consequence of this type of error was that the data entry personnel would have to make additional efforts to determine the proper method of payment. Mr. Barton testified that he reviewed each of these invoices with Mr. Hodgskiss, pointed out the errors and offered advice and instruction.

20. On June 24, Mr. Hodgskiss received a written warning for improper completion of an invoice. On this invoice Mr. Hodgskiss had initially recorded the customer's purchase of three items. He completed boxes B-G of the invoice (subtotals and taxes) and Box H, indicating a total of \$1,444.36. At the last minute, the customer decided to purchase an additional item at an approximate cost of \$750. Mr. Hodgskiss wrote the new figures over the old figures in boxes B-G and elsewhere on the invoice, but not in box H, the total. The result was that financing approval was obtained for the old total of \$1,444.37. When this was discovered, the customer had to be contacted to seek consent to process a second financial check for the remaining \$750, resulting in inconvenience to the customer and delay in delivery.

21. Mr. Hodgskiss testified that the total of \$1,444.37 appearing in box H of the invoice (which was the basis of the error) was not his handwriting. The Board does not find this credible. No other person could have calculated a total of \$1,444.37 based on the numbers appearing on the invoice after Mr. Hodgskiss wrote in the new figures.

22. Furthermore, Mr. Hodgskiss did not obtain the customer's initials beside the new figures. This was a standard practice required by the Brick in order to avoid any confusion as to when the changes took place and whether the changes were authorized by the customer.

23. On June 24, Mr. Gray met with Mr. Hodgskiss in the presence of Mr. Silver to review the errors in this invoice and to present the written warning. Mr. Gray further advised Mr. Hodgskiss that if he was not certain about the proper method of completing an invoice, he was free to approach Gray or other management personnel for assistance. During this meeting Mr. Hodgskiss was advised that failure to follow company policy with respect to the completion of invoices would result in a further written warning and that a second occurrence would result in termination of employment. Mr. Hodgskiss conceded that he left the meeting with the impression that his employment was at risk. However, he testified that he did not take advantage of Mr. Gray's offer to have his invoices reviewed because he decided to wait until he received the additional written warning before availing himself of that option.

24. On July 7, Mr. Hodgskiss received a verbal warning with respect to his low sales volume.

25. On July 17, Mr. Hodgskiss received a verbal warning for arriving two minutes late for a scheduled Saturday morning meeting. Mr. Hodgskiss denies he was late. We prefer the evidence of Mr. Barton on this point.

26. On July 7, Mr. Hodgskiss completed another invoice incorrectly (the "July 7 invoice"). Mr. Hodgskiss wrote the wrong product on the invoice, with the result that the wrong make of mattress and box spring was provided to the customer. This error was brought to Mr. Barton's attention on July 14 or 15. The customer was permitted to temporarily keep the products until the proper products were delivered. Mr. Barton approached Mr. Hodgskiss to review the error in the invoice, and requested that Mr. Hodgskiss complete a new invoice to ensure the delivery of the proper product to the customer. There was no discipline imposed at that time as Mr. Gray decided to discuss with Mr. Silver how to proceed with the ongoing problems related to Mr. Hodgskiss.

27. The follow-up to the error in the July 7th invoice is not relevant to the issue of whether the termination was for cause since it was not discovered until after the termination. However, it may be relevant to the issue of whether the penalty of discharge is appropriate. It is therefore convenient to describe at this juncture the subsequent events relating to that invoice. Mr. Hodgskiss completed a second invoice with respect to this customer's products. This time he got the size wrong. Thus, for a second time, the Brick delivered improper products to the customer. Understandably fed up by this point, the customer sent back both products and decided to shop elsewhere for a mattress and box spring. That invoice was written up on the 15th of July and the error was subsequently discovered by Mr. Barton on July 24, after Mr. Hodgskiss' termination. We note that Mr. Silver's evidence was inconsistent with Mr. Barton's on this point, since Mr. Silver testified that the loss of this customer's business played a role in his recommendation to dismiss Mr. Hodgskiss. However, it was clear from Mr. Barton's evidence and invoice no. 071534B0061 that this error could not have been discovered until July 24, since the second products were delivered to the customer on that date.

28. On July 15th Mr. Hodgskiss completed another invoice incorrectly (the July 15th invoice). The errors on this invoice were caught by the data entry personnel and brought to Mr. Barton's attention on or about July 15. There is no evidence that these errors caused any inconvenience to customers.

29. As a result of the errors on the July 7th invoice and the July 15th invoice (both of which came to Mr. Barton's attention around July 15), Mr. Gray consulted with Mr. Silver (the aforementioned store manager), and they decided that Mr. Hodgskiss was not responding to repeated requests for improvement in his paperwork. Mr. Barton then consulted with legal counsel and

upper levels of management at the Brick who approved his recommendation to terminate Mr. Hodgskiss' employment.

30. On July 24, Mr. Hodgskiss was called into the office with Mr. Barton and Mr. Silver, and was provided with a letter advising that his employment was terminated based on the six verbal warnings, the three written warnings and the culminating incidents of July 15. The culminating incidents referred to in the letter were the July 7th invoice (the written warning) and the July 15th invoice (the dismissal).

31. Having duly considered all of the evidence, we turn to our conclusions on the issue of whether the discharge was for just cause.

32. The employer asserts that it has attempted to progressively discipline Mr. Hodgskiss. As a result of Mr. Hodgskiss' failure to respond, it is relying on the doctrine of culminating incident. The concepts of culminating incident and progressive discipline are arbitral concepts, developed in the context of disciplinary schemes under collective agreements. Section 81.2 complaints occur prior to the first collective agreement, generally in the absence of a formal grievance procedure. At this stage, it is not clear to what extent arbitral concepts will be incorporated into determinations of just cause under section 81.2. However, it is not necessary to reach a final conclusion on this point in this case as the parties relied exclusively on arbitral jurisprudence and did not dispute (subject to one matter discussed below) that progressive discipline and culminating incident were appropriate concepts to apply.

33. We adopt the following passage from Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., paragraph 7:4310, as an accurate summary of the doctrine of culminating incident:

Specifically, the doctrine of culminating incident posits that where an employee has engaged in some final, culminating act of misconduct or course of conduct for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered and blameworthy employment record in determining the sanction that is appropriate for that final incident ... Put somewhat differently, the doctrine permits the employer to adduce evidence with respect to the grievor's prior blameworthy employment record in order to justify its disciplinary action on the occasion of some final act of misconduct which, standing alone, might not warrant the severity of the penalty imposed.

34. The arbitral case law provides that once an employer proves a final act of misconduct, it is generally entitled to rely on the employee's entire disciplinary record to justify the discipline imposed. Thus, the first issue to be determined in such cases is whether the final incidents of misconduct occurred. In this case, we are satisfied that the employer has proved that Mr. Hodgskiss made errors in the July 7 and July 15 invoices and that these errors warranted some measure of discipline.

35. The next issue to be considered is whether the penalty of termination is appropriate in light of the employee's prior disciplinary record. In order to rely on the prior disciplinary record, the employer must demonstrate that the matters on the record were brought to the employee's attention before they can be used to support the penalty imposed.

Conversely, if the employer fails to apprise an employee of those deficiencies on which it has relied in disciplining him, the employee may be able to claim he was lulled into a false sense of security in assuming that the employer has tacitly condoned his pattern of behaviour. Thus, while recognizing that the effect of such a ruling may require the employer to impose formal discipline for what otherwise might be regarded as insignificant matters, the principle is thought to be required to avoid any "misunderstanding on the part of the employee as to the potential consequences of continued behaviour of the kind complained of" (Brown and Beatty, *supra*, at paragraph 7:4314)

36. This duty to warn an employee of the seriousness with which the employer views the employment record has evolved into the theory of progressive discipline.

Very simply, by progressively increasing the severity of the discipline imposed for persistent misconduct it is expected that the employee will be given some inducement and incentive to reform her conduct.

(Brown and Beatty, *supra*, at paragraph 7:4422)

37. Mr. Hodgskiss asserts that the employer is not entitled to rely on his prior employment record because he had no opportunity to grieve the prior disciplinary warnings. The applicant relied on *Re K-Line Maintenance & Construction Ltd. and I.B.E.W.* (1988), 35 L.A.C. (3d) 358 (Cromwell) wherein it was stated at page 370:

With respect to the culminating incident doctrine, it seems to me that no weight should be given to evidence of alleged past misconduct unless that past misconduct gave rise to disciplinary action which could have been the subject of grievance at the time it was imposed.

See also *Re Calgary General Hospital and C.U.P.E.*, (1986), 23 L.A.C. (3d) 25 (Beattie).

38. The protection against dismissal without just cause in section 81.2 is *only* applicable in the period prior to the first collective agreement when it is unlikely that there is any grievance procedure. If the applicant's argument is accepted, an employer would never be able to assert a culminating incident during the period prior to the first collective agreement and rely on the prior disciplinary record of the employee. We reject this argument.

39. The rationale of the decisions in the cases referred to by the applicant was one of fairness. In those cases the prior disciplinary record was excluded, not solely because there was no ability to grieve, but because the offences were not brought to the employee's attention in such a way as to avoid any misunderstanding on the part of the employee as to the potential consequences of continued behaviour of that kind.

40. A similar argument was made in *Lincoln Place Nursing Home* (1976) 13 L.A.C. (2d) 379 (Beck) in which it was stated at page 392:

The point of the admissibility of the pre-collective agreement disciplinary record is a particularly difficult one and there is no direct precedent to guide us. It is true, as counsel for the union argued, that there was no formal mechanism in place by which the grievor could challenge any discipline, including warnings, imposed by the employer. Nor was there any standard such as just cause against which the employer's action could be measured. Is this sufficient reason to exclude the pre-collective agreement record in taking into account the appropriate discipline to be imposed when an incident has occurred after the collective agreement has been entered into? We do not think that it is. We do not believe that a rule of automatic exclusion makes good sense or would be good practice. We believe that counsel for Lincoln Place correctly framed the question when he asked "is the record a legitimate one, and have similar records been kept for all employees?" *In other words, it is our view that a pre-collective agreement record ought to be very carefully scrutinized given the fact that there was no formal grievance procedure available.* But once it has been carefully scrutinized, and once a Board is satisfied that it is a legitimate record, fairly kept, and particularly, as the evidence here showed, has been discussed with the employee and the employee given a chance to make a written comment, there is no reason not to accept that record and we so hold.

(emphasis added)

41. The absence of a grievance procedure requires that the prior discipline record be carefully scrutinized. In this case, the employer was prepared to and did prove misconduct in respect of the six verbal warnings and the three written warnings. We are satisfied that each of the warnings

relied upon by the employer was brought to Mr. Hodgskiss' attention in such a manner as to make clear to him the consequences of continued misconduct. Therefore, the employer is entitled to rely on Mr. Hodgskiss' prior employment record.

42. The applicant further asserts that it was unfair to rely on the July 7th and July 15th invoice errors together to justify dismissal, without giving him one final opportunity to improve his performance. The June 24th warning letter stated that a further invoice error would result in a second written warning and a further error would result in dismissal. However, the Board concludes that it would be too rigid to require the Brick to treat the two mistakes as justifying only a second written warning, simply because the mistakes occurred too close together to enable the Brick to first deliver a written warning before the final penalty of dismissal.

43. We adopt the following reasoning from *Re Canada Post and CUPW* (1990), 15 L.A.C. (4th) 418 (Adell) at pages 425-6, 428-9:

Progressive discipline usually envisages that in disciplining an employee, an employer will proceed first by way of warnings, oral or written, then by way of increasingly long suspensions, with discharge being used only as a last resort if the employee's conduct or performance continues to be unsatisfactory. One reason for requiring progressive discipline is to ensure that the employee fully realizes that his or her job will be in jeopardy if his or her conduct continues to be unsatisfactory. Another is to ensure that the employee has a chance to make the necessary improvement. Yet another, I think, is simply to ensure respect for the time and energy which the employee has invested in the job and the service which he or she has given the employer. ...

However, exactly what action is required of the employer in order to meet the requirements of progressive discipline surely varies from case to case. Unless a specific order of sanctions is mandated by the collective agreement or by past practice between the parties, I do not think an arbitrator should insist that any such order be rigidly followed. What is crucial, in a discharge case, is whether the sanctions which were in fact used before discharge were sufficient to convey unambiguously to the employee that his or her job was at risk and to give that employee a fair chance to do what was needed to avoid discharge. ...

If an employee has a substantial record of satisfactory service, or if his or her misconduct (though repeated) is of a relatively minor sort, nothing but long suspensions may suffice to meet the purposes of progressive discipline. The same may be true if the employer has a known practice of imposing increasingly long suspensions before discharge, so that even repeated stiff warnings might not put the employee adequately on notice of the danger of losing his or her job. However, where the employee's record of service is short and weak, where the misconduct in question is quite serious and does not merely consist of minor incidents, and where the employer, rather than having done anything to lull the employee into thinking that his or her job is not in immediate jeopardy, has explicitly warned him or her that it is, it would simply be too rigid to require the employer to proceed through a series of suspensions before invoking discharge.

44. In this case we are satisfied on the basis of Mr. Hodgskiss' own evidence that he was fully aware, following the June 24th meeting, that he would lose his job if he made two more invoice errors. We conclude that there is no unfairness to Mr. Hodgskiss in relying on the July 7 and July 15 invoices.

45. The Board concludes, in light of all the circumstances, including Mr. Hodgskiss' prior disciplinary record, that the penalty of termination is just and reasonable and declines to exercise its discretion to substitute a lesser penalty. Specifically, the Board has considered the following circumstances:

- i) Mr. Hodgskiss was first verbally warned about improper completion of invoices on January 8. He had received training on the proper

completion of invoices and had been working for approximately two months by this time. On the evidence, we find this to be sufficient time to master the task of properly completing an invoice. On April 27, Mr. Hodgskiss received a second verbal warning for improper completion of invoices. On June 24, he received a written warning for improper completion of an invoice. He was aware that two further errors could result in his termination and was offered the opportunity to have all invoices reviewed by management. He declined to do so. On July 7, Mr. Hodgskiss made an invoice error and on July 15th he made another one. We find that Mr. Hodgskiss' repeated errors were caused by carelessness and inattention to detail on his part, not by any lack of training or experience. We are further satisfied that Mr. Hodgskiss was given adequate opportunity to improve his performance in this area, but was unwilling or unable to do so.

- ii) The Brick has a substantial interest in serving its customers in a timely and efficient manner. Consumers expect the correct product to be delivered on the promised date. The Brick cannot be asked to tolerate an employee whose carelessness poses a real risk of displeasing or losing customers.
- iii) The Board is not satisfied that Mr. Hodgskiss has exhibited any rehabilitative potential in this area. With respect to one invoice Mr. Hodgskiss denied he made an error, which the Board has found is not the case. With respect to the remaining invoices, Mr. Hodgskiss did not deny the errors but sought to avoid responsibility by suggesting that the training had been inadequate. There is no evidence that he raised the adequacy of the training at any time prior to the hearing. Moreover, he failed to take advantage of the offer to have his invoices reviewed. Mr. Hodgskiss simply does not believe he has a problem with the proper completion of invoices, and we are not satisfied that if Mr. Hodgskiss were reinstated he would not continue to make the same mistakes.
- iv) Finally, Mr. Hodgskiss does not have a long record of satisfactory service.

46. For the foregoing reasons, the application is hereby dismissed.

1287-92-U Canadian Union of Public Employees, Local 5, Applicant v. The Corporation of the City of Hamilton, Responding Party

Interference in Trade Unions - Natural Justice - Practice and Procedure - Unfair Labour Practice - Board dismissing motion alleging that manner in which hearing conducted by panel denying natural justice - Board finding that discipline by employer of union executive member for engaging in legitimate and protected union activity violating the Act - Employer directed to rescind discipline

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *Brian Sheehan*, *Sid Gratton*, *Dave Michor* and *Louis Cialini* for the applicant; *Walter Thornton*, *R. J. Menagh* and *J. G. Pavelka* for the responding party.

DECISION OF JANICE JOHNSTON, VICE-CHAIR, AND BOARD MEMBER K. DAVIES;
November 9, 1993

1. This is an application pursuant to section 91 of the *Labour Relations Act* (the "Act") alleging a violation of sections 3, 65, 67 and 71 of the Act.

2. By way of preliminary remarks, the Canadian Union of Public Employees, Local 5 (the "union" or "CUPE") argued that the Corporation of the City of Hamilton (the "City" or the "employer") violated the Act when it issued a written reprimand to Mr. David Michor, a member of the union's executive committee. The union viewed the letter as having a chilling effect on the lawful activities of the trade union. The union took the position that the activities engaged in by Mr. Michor were protected union activities under the Act. The City conceded that the activities of Mr. Michor were lawful activities protected by the Act. However, this was not the issue in their submission. The City stated that the discipline of Mr. Michor had nothing to do with the union and the fact that he was a member of the union's executive. He was disciplined for a breach of the duty of fidelity owed by an employee to his employer. In the employer's view any person who acted as Mr. Michor had would be dealt with in the same way. The City characterized the issue before the Board as not what is permissible union activity, but has the employer violated the Act by disciplining Mr. Michor.

3. The following agreed statement of facts was provided to the Board by the parties:

1. The Corporation of the City of Hamilton ("the City") and the Canadian Union of Public Employees, Local 5 ("Local 5") are bound to a collective agreement.
2. The City operated and managed the Dundurn Castle Aviary at all material times. The 1991-1994 collective agreement between Local 5 and the City contains a Job Title for Aviary Technician.
3. On March 27, 1992 the committee of the whole of the City Council eliminated the Aviary technician position, effective July 1, 1992, which gave rise to the possible closing of the Aviary. It was decided that the incumbent in the Aviary technician position be transferred to another bargaining unit position.
4. Subsequently, officials of the City were contacted by representatives of volunteer groups regarding volunteers being utilized to keep the aviary operating after July 1, 1992.
5. Local 5 decided to initiate a lobbying campaign designed to maintain the Aviary Technician position.

6. On May 19, 1992, the Parks and Recreation Sub-Committee of City Council debated a recommendation of the Manager of Streets and Sanitation that "approval be given for the Hamilton and District Budgerigar and Cage Bird Society and the Caged Bird Society of Hamilton to manage the operation of the Dundurn Aviary with volunteers effective July 1, 1992 ..."
7. Included in the recommendation was a proposed management plan jointly submitted by the Societies (hereinafter referred to as the "Society").
8. At the May 19, 1992, meeting of the Parks and Recreation Committee, Mr. David Michor, Grievance Committee Chairperson for Local 5, made a presentation on behalf of the Local seeking to have the Aviary Technician position retained. The Local indicated that it was not opposed to the use of volunteers to assist the Aviary Technician.
9. The recommendation of the Manager of Streets and Sanitation to the Parks and Recreation Committee was passed.
10. On May 20, 1992, Mr. Michor decided to attempt to lobby Ms. Bernadette Hansen, one of the spokespersons for the Society, at her home. Mr. Michor identified himself to Ms. Hansen as a representative of Local 5.
11. Later that evening Mr. Michor spoke by telephone to other representatives of the Society, including a Ms. Little and a Mr. Webb.
12. On May 22, 1992, Local 5 held a Press Conference to state its opposition to the elimination of the Aviary Technician position. Mr. Michor was one of the spokespersons from Local 5 at the Press Conference.
13. On May 25, 1992, City Council approved the May 19, 1992, Parks and Recreation Committee recommendation.
14. On June 24, 1992, Mr. Michor received a written warning from Mr. J.G. Pavelka, Chief Administrative Officer for the Corporation of the City of Hamilton.

The Board also heard from two witnesses, Mr. J. G. Pavelka, Chief Administrative Officer for the City of Hamilton and Ms. Bernadette Hansen, who gave evidence on behalf of the City.

4. This matter was heard by the Board on May 7, 1993. On May 11, 1993 the Board received the following letter from counsel for the City:

We represent the City of Hamilton in the above-noted matter.

At the hearing on Friday, May 7, 1993, the City raised certain objections (the details of which were provided to the Board) based on a denial of natural justice. The City made its submissions in relation to the merits of the Complaint on a without prejudice basis.

The applicable decisions (some of which are enclosed) indicate that a denial of natural justice is a "jurisdictional" error. Accordingly, the City respectfully submits that the Board should make a decision in relation to the objections raised by the City, and only issue a decision on the merits of the Complaint if such objections are dismissed.

5. The submissions referred to by counsel for the employer were made at the conclusion of the evidentiary portion of the case. At the outset we would observe that at the time he made his submissions to the Board, counsel for the City did not assert that he was making an objection to the Board's jurisdiction. Nor did he indicate that he was making his submissions with regard to the merits of the complaint on a without prejudice basis. After listening to counsel's submissions, the Vice-Chair asked counsel why he was making the submissions and asked what he was requesting the panel to do as a result of them. Counsel for the City responded that he would go ahead with his

submissions on the merits unless the Board refused to allow him to do so. He indicated that the Board could then make its decision on the merits and the City, in his words “can do what we feel is appropriate”. Counsel did not allege bias or a denial of natural justice. The Board did not preclude him from making his submissions on the merits, which he proceeded at that point to do.

6. In the submissions referred to in the letter, counsel put various concerns before the Board. We will set out these concerns and then provide the context within which they arose. First of all, counsel indicated that he felt he had been pressured to put his evidence in quickly and that he therefore had questioned witnesses in a more abbreviated fashion than he would normally have. He stated that he felt that his questioning of Mr. Pavelka was limited by his questioning of Ms. Hansen. Secondly, he argued that the Vice-Chair had formed an opinion with regard to the law in this case as the Vice-Chair agreed with a particular comment made by counsel for the union. Finally, in his opinion, the Vice-Chair also pressured him into answering a question which he felt was not relevant and in answering it he felt that he was being forced to acknowledge that it was relevant. In addition, counsel for the employer pointed out that the Vice-Chair appeared to be annoyed by his reluctance to answer the question.

7. To understand counsel’s submissions, it is necessary to review the portion of the hearing which caused him concern. In examination in chief of Mr. Pavelka, counsel on behalf of the City asked Mr. Pavelka to provide the Board with a summary of his conversations with Ms. Hansen. Counsel on behalf of the union objected to the question on the basis that it would elicit hearsay evidence and pointed out that Ms. Hansen, who had already completed her testimony, had not been asked to elaborate on her conversations with Mr. Pavelka. Ms. Hansen had only been asked whether she had had conversations, not about the content of those conversations.

8. In support of his position that the question was appropriate, counsel for the employer argued that it was important for the Board to hear the information upon which Mr. Pavelka acted. He argued that the City sought to put the evidence before the Board, not for the truth of it, but to establish why the employer disciplined Michor. It appears that the disputed evidence went to whether Ms. Hansen was upset by Mr. Michor’s visit. Counsel for the union objected again and asked whether the City was suggesting that Mr. Michor applied undue pressure or in some way “crossed the line” and acted improperly in his conversation with Ms. Hansen. Counsel for the union expressed concern that this had not been pleaded and was not the case he was prepared to meet. He indicated that he understood the City was taking the position that Mr. Michor lobbied or pressured Ms. Hansen but did not apply undue pressure or conduct himself inappropriately towards her. Based on the pleadings, counsel for the City’s opening remarks and the agreed statement of facts, this was the Board’s understanding as well. We understood the City’s position to be that Mr. Michor was disciplined because he had the conversation, not because he was abusive or intimidating towards Ms. Hansen. As counsel for the City refused to answer union counsel’s question, the Vice-Chair also expressed concern that the City appeared to be changing the theory of its case midway way through the proceedings and asked whether the City was alleging that Mr. Michor’s conduct “crossed the line”. Counsel for the employer did not answer this question. In an attempt to clarify the question, the Vice-Chair referred to arbitral jurisprudence in which union representatives had been disciplined for inappropriate conduct or for conduct characterized as crossing the boundary of protected union activities. Counsel for the City still did not answer the question and did not appear to understand that he was being asked by the Vice-Chair whether he was attempting to change the theory of his case as it had been pleaded and understood by both the Board and counsel for the union. For whatever reason, counsel for the City did not answer the Board’s question.

9. After hearing the submissions of counsel and taking a short recess to consider the mat-

ter, the Board unanimously upheld the union's objection for the reasons provided at the hearing, including on grounds of relevance, as the content or manner of the conversations between Mr. Michor and Ms. Hansen had not been put in issue and questions about the content were not relevant. It would have been unfair, after Ms. Hansen had finished testifying to allow the employer to raise this issue for the first time. After the Board's ruling, counsel for the employer abruptly ended his examination in chief of Mr. Pavelka after asking only two more questions. The cross-examination of Mr. Pavelka followed and although he was given the opportunity, counsel for the employer did not ask any questions in re-examination. The union elected not to call any evidence, therefore the evidentiary portion of the case concluded at this point. The lunch break was taken and when we returned after lunch counsel for the City made the submissions already referred to.

10. In support of his position that the City had been denied natural justice counsel for the City referred the Board to the following cases: *Re Coastal Transport Ltd. and Seafarers' International Union of Canada*, (1975) 57 D.L.R. (3d) March 618.; *Re Golomb and College of Physicians and Surgeons of Ontario*, (1976) 68 D.L.R. (3d) Jan. 25; *Re Gooliah and Minister of Citizenship and Immigration*, (1967) 63 D.L.R. (2d) Apr. 224; *Re Stora, etc. and Woodlot Ass'n*, (1975) 61 D.L.R. (3d) June 97; *Re McKendry and Deputy Minister of Department of Regional Economic Expansion*, (1973) 35 D.L.R. (3d) Feb. 305; and *Re Actus Management Ltd. and City of Calgary*, (1975) 62 D.L.R. (3d) Sept. 421.

11. Do counsel for the City's expressed concerns with regard to the manner in which the hearing was conducted establish that the City has been denied natural justice or that the comments made and questions asked by the Vice-Chair in the course of the hearing indicate bias, either actual or perceived? In *Careful Hand Laundry and Dry Cleaners Limited*, [1988] OLRB Rep. Dec. 1205 the Board outlined the appropriate test with regard to allegations of bias. The relevant portion reads as follows:

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6. The applicable test was framed as follows by Laskin C.J.C., speaking for the majority, in *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C.): that a reasonably well-informed person could properly have a reasonable apprehension of a biased appraisal and judgment of the issues to be determined (p.733). The Chief Justice continued that "the test of reasonable apprehension of bias ... [is a restatement of] what Rand, J. said in *Szilard v. Szasz*, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7 [which, like the *Committee for Justice and Liberty*, involved bias based on prior association], in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it be'".

7. The test is an objective one. It is not sufficient to find apprehension of bias in a decision-maker simply because one party states "I am afraid the adjudicator will be biased because of something she said"; on the other hand, it is not sufficient for the adjudicator to deal with the matter simply by saying "I am not biased" or "I do not think anyone should think I would be biased". An objective test is necessary to avoid both allegations and determinations which are more reflective of self-interest than actuality. The determination must therefore be based on an assessment of the impugned words, including the context in which they were made and the surrounding statements. The test is whether a person who is informed about the circumstances surrounding the event giving rise to the allegation could have a reasonable apprehension that the adjudicator will not or will not be able to determine the matters in issue in a manner consistent with providing a fair and impartial hearing.

12. Counsel for the City indicated that he felt pressured to put his evidence in quickly. However, no details as to the cause of this perception have been provided. The Board had scheduled two hearing days to deal with this case. On the first day of hearing, after having heard the opening statements of counsel, the Board suggested that the parties make one more attempt to set-

tle the case. This attempt was unsuccessful and the hearing re-convened at 3:30 p.m. The Board at this time requested that the parties endeavour to reach agreement on as many of the facts as possible. The pleadings reflected that very little was in dispute factually between the parties. Given that the first day of hearing had been lost, the Board did indicate concerns that the hearing may not be completed in the time allotted if this effort was not made. The parties agreed to the Board's suggestion and were successful in reaching agreement on many of the facts, as already noted. Perhaps it is this pressure that counsel was referring to when he alleges that he had been pressured to put his evidence in quickly. While the Board may have expressed concerns, once the hearing of evidence commenced on the second day, the Board did not interfere (other than in dealing with objections made by the union) with the manner in which counsel chose to present their cases. Naturally the Board wanted to make the most efficient use of the time available. This is not unusual nor is there anything untoward in it. The Board's conduct in this respect was not a denial of natural justice.

13. Counsel for the City did not argue that the Board had prevented him from calling witnesses or had cut short his questioning of a witness. Other than the fact that the Board upheld the objection raised by counsel for the union in the one instance already dealt with, counsel for the City was allowed to put his case before the Board. The Board provided counsel with a full opportunity to call as many witnesses as he deemed appropriate and other than the one incident already referred to, counsel's questioning of his witnesses was not curtailed by the Board in any fashion. Counsel for the City did not request the opportunity to recall Ms. Hansen, nor did he offer any explanation for his failure to question her regarding the comments she made to Mr. Pavelka. Both parties were afforded the opportunity to make full submissions.

14. Counsel for the City expressed concerns that the Vice-Chair had formed an opinion with regard to the law, forced him to respond to a question he did not consider relevant and then seemed to be annoyed. As already noted, in dealing with an objection to a question asked by counsel for the City the Vice-Chair referred to some jurisprudence in an attempt to clarify the objection that counsel for the union had made. The jurisprudence was merely being utilized to assist counsel for the employer in understanding the question he was being asked. The cases were raised to provide examples of particular factual situations. They were raised in an attempt to ascertain why the City sought to introduce the evidence that counsel for the union had objected to. It appears that counsel for the City may have misinterpreted what was said, and why it was said. It is not alleged that the City was denied the opportunity to call its evidence, make full final submissions and refer the Board to the jurisprudence it considered relevant. Nothing in the Board's comments could reasonably lead to the apprehension that the Board had already "made up its mind". Adjudicators often have a sense of the merits of the parties' positions, a sense which may well change as a case proceeds. Having such a sense, an awareness of the obstacles a party may have to overcome to be successful, does not constitute a denial of natural justice, nor does it raise a reasonable apprehension of bias.

15. Turning to the question asked of counsel by the Board, it is not for counsel to assess whether the questions are relevant or merit a response. Anyone who refuses to answer a question asked by the Board does so at his/her peril. The Board would not be able to properly conduct hearings, or fulfill its statutory mandate, if it could not ask questions of counsel or if counsel decided whether the questions deserved answers. In the case at hand, it is difficult to conceive of a more relevant question of counsel than one which asks what his case is about. For all of the reasons outlined, in the result, we conclude that there was no denial of natural justice. The City's motion is therefore dismissed.

16. Turning now to the merits, there is little dispute on the facts in this case. However, the

parties characterize and interpret the facts differently and attach different attributions to the conduct of Mr. Michor.

17. As noted in the agreed statement of facts, the day after the Parks and Recreation Committee accepted the management plan put forward by the two societies, Mr. Michor went to the home of Ms. Hansen. Mr. Michor obtained Ms. Hansen's address from the first page of the management plan which had been submitted. Mr. Michor visited Ms. Hansen around 6:30 p.m. on May 20, 1992. When he arrived at her house he introduced himself as a representative of the union and gave her a business card. He then asked Ms. Hansen's permission to discuss with her the matter which had been dealt with by the Parks and Recreation Committee the day before. Ms. Hansen invited him in, made coffee and they discussed the matter for forty-five minutes to one hour.

18. Mr. Michor indicated to Ms. Hansen that he was there on behalf of the union to win the co-operation of the societies in assisting the union in its attempts to retain the position at the Aviary. Mr. Michor and Ms. Hansen each had a copy of the plan which had been submitted by the societies to the Parks and Recreation Committee the day before. They went through the plan and Mr. Michor suggested changes that the union would like the societies to make to the plan. Ms. Hansen wrote the changes on her copy of the plan. The changes reflected the position that Mr. Michor, on behalf of the union, was requesting the societies to adopt, namely that volunteers from the societies were to assist the Aviary Technician, not take over the job of the Aviary Technician and the management of the Aviary. Mr. Michor told Ms. Hansen that the incumbent Aviary Technician would lose his job and be moved to another position. He told Ms. Hansen that the union would like the societies to show their support for the retention of the Aviary Technician position by attending a press conference being held on June 22, 1992. Ms. Hansen explained to Mr. Michor that she was only the secretary treasurer of her society and had no authority to change the management plan that had already been passed. Ms. Hansen gave Mr. Michor Ms. Joan Little's telephone number so that he could discuss his suggestions with her. The tone of the conversation between Ms. Hansen and Mr. Michor was very pleasant and no heated words were exchanged. To use the words of Ms. Hansen "he (Mr. Michor) was very nice during the whole time".

19. After her discussion with Mr. Michor, Ms. Hansen had discussions with Ms. Little and other members of the Societies regarding her conversation with Mr. Michor. She indicated to them that she had been visited by a union representative and that he had requested that the two societies participate in the press conference. Ms. Hansen also indicated to people that she did not agree that the societies should do so. Ms. Hansen first spoke on the telephone to Mr. Pavelka on June 15, 1992. Mr. Pavelka confirmed various facts with regard to Mr. Michor's visit to her. Mr. Pavelka spoke with Ms. Hansen two or three times.

20. Mr. Pavelka made the decision to discipline Mr. Michor. He went to the Human Resources Department to get advice on the appropriate level of discipline and with the assistance of someone from that department formulated the warning letter given to Mr. Michor. That letter reads as follows:

It has come to my attention that on the evening of Wednesday, May 20, 1992 you visited and telephoned Ms. B. Hansen and Ms. J. Little, two members of the Hamilton Cage Bird Society.

It appears that your intention in visiting these individuals was to pressure them into reconsidering their decision to volunteer their services in the Aviary. Your visit to these citizens took place following a meeting of the Parks and Recreation Committee at which the Union was given an opportunity to present its position.

Following a decision by that Committee to proceed in a manner that the Union did not agree with, you engaged in activities which were clearly designed to subvert the will of the Corpora-

tion as expressed by its elected leaders. We cannot but view this behaviour as placing you in a direct conflict of interest with your employer in attempting to undermine or impair the credibility and functioning of its Public Works Department and its programs. This behaviour is completely unacceptable and warrants a disciplinary response in the form of a suspension or termination.

Since this is the first occasion where a member of your Local, either acting alone or as a representative of the Union executive, has engaged in such activity, we feel it is appropriate instead to express the employer's displeasure by placing this written reprimand on your personal file.

We hope that this will serve the purpose of alerting not only yourself, but also the Union body in general, to the fact that the Employer will not tolerate this type of behaviour and will deal with it severely in the future. You and your Union should understand that future occurrences of this type of activity will be dealt with by suspension or termination.

21. In examination in chief Mr. Pavelka testified that his decision to discipline Mr. Michor was in no way based on Mr. Michor's position with the union. He indicated that he decided to, in his words, "write to this employee because he had overstepped his bounds". Yet in cross-examination, he acknowledged that he was trying to send a message to the union's executive and that the letter of discipline was beyond a letter to Mr. Michor alone. Later in cross-examination, he changed this testimony and again testified that the letter was not intended to be a message to the union.

Argument

22. Counsel on behalf of the City acknowledged that Mr. Michor's activities amount to lawful trade union activities within the meaning of section 3, 65, 67 and 71 of the Act. However, in his submission by admitting this the employer was not thereby admitting to a violation of the Act. He argued that Mr. Michor was disciplined for his breach of the duty of fidelity he owes to his employer and that the discipline was not in any way based on Mr. Michor's position in the union. Counsel argued that if any employee engaged in similar conduct they would be disciplined.

23. In his argument counsel for the employer referred the Board to *The St. Catherines General Hospital*, [1982] OLRB Rep. Mar. 441; *Mel Hall Transport*, [1991] OLRB Rep. Jan. 61; and an excerpt found at pages 489 to 497 from Canadian Labour Law, a text written by The Honourable Mr. Justice George W. Adams. Counsel argued that the *St. Catherines General Hospital*, *supra*, stood for the proposition that the employer's motive in imposing discipline is relevant to a determination as to whether the Act has been violated. In order to conclude that the Act has been violated the Board has to find that the employer's motivation was improper and that it constituted an attempt to interfere with the trade union. Counsel did concede that section 65 is the only section that could be "non-motive" in nature. In referring to the Adams' excerpt, counsel argued that the Board, to rule in favour of the union, must find actual unfair motive or infer one in the circumstances. The Board must find the absence of a legitimate employer purpose in disciplining Mr. Michor to conclude that there has been a breach of the Act. Based on the Board's jurisprudence, counsel argued that if there is no anti-union motive the complaint should be dismissed.

24. The employer's counsel took the position that it is not the task of the Board to determine whether it disagrees with the letter given to Mr. Michor nor to determine whether a written warning was appropriate in the circumstances. The employer argues that Mr. Michor was disciplined for his breach of the duty of fidelity but points out that it is not up to the Board to determine if the duty owed by an employee to the employer was in fact breached. Those questions may only be properly answered by an arbitrator in counsel's opinion. The Board's duty is to decide if the reason given for the discipline, breach of duty of fidelity, was in fact the reason Mr. Michor was disciplined. If the Board was to rule against the employer simply because discipline was imposed,

without looking at the employer's motive, counsel argued that that would in future deprive the employer of the right to discipline.

25. The employer's counsel argued that the actions of Mr. Michor were intentional and his purpose in visiting Ms. Hansen was to persuade her to change the management plan which had been submitted. The only purpose for the visit was to achieve that objective. The Board should therefore conclude, in counsel's opinion, that Mr. Pavelka's response was aimed at that perceived breach of fidelity and nothing else.

26. Counsel on behalf of the union admitted that there is a legitimate employer interest in ensuring that employees do not breach the duty of fidelity which is owed to the employer. However, counsel suggested that the question in this case is how to balance the protected activities of a trade union to represent its members, against this duty of fidelity. Counsel argued that a union is obligated to represent its members and has rights which are protected by the Act.

27. In this case, counsel pointed out that Mr. Michor was disciplined for criticising or lobbying against a decision made by a committee of the City council. There were no allegations of abusive or coercive behaviour on the part of Mr. Michor, he was disciplined for the mere fact that he lobbied against the City's decision. Counsel suggested that lobbying third parties is fundamental to a trade union's role and that an employer cannot expect the union to automatically "fall in line" if a decision is made that it disagrees with. In counsel's opinion, ultimately in this case the employer is sending a message to the union and is trying to stifle and control the legitimate representational rights and protected or lawful activities of the trade union when it suggests that resort to the public to express disagreement with an employer's decision is a breach of the duty of fidelity and will result in discipline. Counsel pointed out that the union in this case is a public sector union that regularly deals with the public and lobbies the representatives of the public, the City Aldermen.

28. Counsel for the union argues that section 3 of the Act creates substantive rights which are enforceable through other sections. Section 3 gives every person the right to participate in lawful union activities. Counsel took the position that it was clear that section 67 and section 71 of the Act had been violated, as the City was trying to compel Mr. Michor and the union to refrain from engaging in activities, which by the City's own admission, were protected by the Act. Counsel acknowledges that the discipline was not motivated by an anti-union motive but the fact remains that Mr. Michor was disciplined for exercising rights protected by the Act. If the behaviour is protected and Mr. Michor was disciplined for it, it must be a violation of the Act in counsel's opinion. Counsel argued that the Board's jurisprudence makes it clear that not every interference with a trade union's rights will give rise to a violation of section 65 and that the Board balances the rights of a union vis a vis the rights of an employer in determining whether section 65 has been violated. Intent on the part of the employer is not a necessary prerequisite to a violation of section 65. Counsel suggested that if the employer's intention in imposing discipline were the key, the employer could fire the whole union executive for engaging in protected activity and then argue that their status in the union had nothing to do with the decision.

29. Counsel for the union also referred the Board to *St. Catherines Hospital, supra*, case in support of his argument. He pointed out that counsel for the employer misses the key issue in *St. Catherines Hospital, supra*, case which is that discipline was not imposed by the employer and there was no direct interference or letter to a union representative from the employer indicating that future incidents would result in more serious discipline. In the case before the Board, discipline was imposed and the employer directly interfered with the union's rights under the Act. On the facts in *St. Catherines Hospital, supra*, the Board felt that it could only find a violation of the Act if the referral to the College of Nurses was triggered by a reprisal mentality or motive as the

employer itself did not impose discipline. In support of his arguments counsel also referred the Board to *Re Burns Meats Ltd. and Food & Allied Workers*, (1980) 26 L.A.C. (2d) 379; *Re Canada Post Corp. and C.U.P.W. (Van Donk)*, (1990) 12 L.A.C. (4th) 336; *Re Interforest Ltd. and International Woodworkers, Local 1-500*, (1990) 12 L.A.C. (4th) 257; *A. Marie Samson v. Canada Post Corporation, Arichat, N.S.*, [1987] Can CLRB/CCRT 654.

Decision

30. The relevant sections of the Act are:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

31. There is no dispute that Mr. Michor is a member of the union's executive, that this fact was known to the employer and that the activities engaged in by him which resulted in disciplinary action in the form of a written warning, were lawful trade union activities protected by the Act. When Mr. Michor visited Ms. Hansen, he was acting in the capacity of a trade union representative and not as an employee. He showed his business card to Ms. Hansen and the discussion which followed was a result of Ms. Hansen's acceptance of his status and role in the union. Mr. Michor's visit was on behalf of a bargaining unit member who was about to lose his position. Mr. Michor did not visit Ms. Hansen to lobby her on matters that affected him personally, the reasons for his visit arose out of his capacity as a union official and his desire to assist an employee in the bargaining unit.

32. There is no disagreement concerning the actions of Mr. Michor which led up to his discipline. However, the employer takes the position that these actions constituted a breach of fidelity

which merited discipline and the union argues that no discipline is warranted as Mr. Michor was legitimately exercising his rights and duties as a representative of the union.

33. In *St. Catherines Hospital supra*, the grievor, a registered nurse and union president, was reported by the employer to the College of Nurses of Ontario for speaking to the Press about actions on the part of the Hospital that she disagreed with. The employer characterized her conduct as unprofessional. The union argued that the grievor's actions were protected activities under the Act and that in reporting her to the College the employer was interfering with her legal rights. The Board characterized the issues before it in that case as whether the grievor is entitled to the protection of the *Labour Relations Act* having acted as she did and, if so, whether the Hospital improperly attempted to interfere with the exercise of her freedom under the statute by filing the complaint with the College. After reviewing some of the relevant jurisprudence concerning the respective rights of employers and trade unions, the Board went on to say:

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40. Thus, legitimate employer interests are not swept aside by the legislation. The legislation must be interpreted in the context of an employment relationship and the reciprocal responsibilities of such a relationship. In many cases, indeed most, the accommodation is made on the basis that the requisite unlawful intent of the employer is absent when he is seeking to protect a legitimate interest. *Swingline*, cited above, is a *locus classicus* in this regard. But this is not always the case. Sometimes the very actions of the employee to which the employer objects are alleged to constitute union activity which is protected by the statute. In these cases, some balancing of interests by this Board in light of the purposes of the *Labour Relations Act* is required in order to ascertain the limits of the employee or employer freedom claimed. *Kuchener-Waterloo Hospital, supra*, falls more directly in this category of cases. Fortunately, this Board has not been confronted with a great number of such cases.

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43. In considering the issues before us a number of approaches are possible. One approach might be to hold that public disparagement of an employer is inconsistent with an ongoing employment relationship and never a lawful activity under the Act worthy of protection. This approach would seek to discourage attempts by trade unions to involve and inform the public although it would only do this in respect of employees. Full time union officials could carry on such efforts subject only to the laws of libel, slander and defamation. There would also be the problem of the press reporting statements directed to employees and the general interest of the public for explanations of particular industrial disputes. At the opposite extreme is the option of permitting employee union officials an unlimited licence to speak publicly about an employer provided the statements relate in some general way to the collective bargaining relationship. This approach would assume that employers could adequately respond in kind and that anything short of such total protection would have an undue "chilling effect" on this type of union activity. An employer could still try to invoke the sanctions available to him in the civil courts and, in doing so, our courts would have to consider the relationship between statutory collective bargaining laws and the laws of libel and slander. In between these two polar positions are a variety of other options. This Board could impose procedural requirements of internal discussion and investigation by the parties before recourse is made to public statements. There might be the limitation that only true statements are to be made publicly with the risk that a statement is untrue residing with the maker. There might also be an approach protecting heated rhetoric and public statements made without malice. This latter approach would not protect statements known to be untrue or made recklessly without concern for truth or falsity but would seek to accommodate the fragile nature of speech rights and the inevitable emotions associated with labour relations.

44. Arbitration cases have, on a case by case basis, grappled with similar problems and have devised a number of useful principles. The court in *Regina v. Fuller et al, Ex parte Earles and McKee*, [1968] 2 O.R. 564, reviewing an arbitration award, emphasized that an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do some-

thing which may harm his employer's business. Public vilification of an employer and its officers by individual employees does not have to be tolerated. See *Re Office and Professional Employees International Union, Local 263* and *Lord Burnham Co. Ltd.*, *supra*. Physical obstruction in the form of picketing "ostensibly" for the purposes of informing others, but in fact designed to impede employees at a secondary location, can be reacted to by an employer in the form of discipline. See *Re Bell Canada and Communication Workers of Canada* (1978), 22 L.A.C. (2d) 119 (Springate). See also *Re Edmonton General Hospital and United Nurses Association* (1980), 26 L.A.C. (2d) 393 (Anderson) where improper activity arose out of a public statement. ...

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46. One of the most helpful Canadian arbitration cases in *Re Burns Meats Ltd. and Canadian Food and Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379 (M. Picher). In that case the company had discharged the grievor because of what it considered false and defamatory statements about two company officers which he printed in a union newsletter in the course of his duties as chief steward of the union. The public statements were made by the grievor in interpreting the company's conduct with respect to a recent arbitration hearing. While the actual statements objected to are not reported, it is clear that he took exception to the company's bona fides in contesting the grievances. In developing a framework of principles against which to review the facts before it, the majority of the board of arbitration canvassed many of the key American cases that have arisen in the context of *The National Labor Relations Act* and adopted the test in that country laid down in *Linn v. United Plant Guard Workers of America, Local 114 et al* (1966), 383 U.S. 53 to the following effect as reported at pages 62 and 63.

We acknowledge that the enactment of s.8(c) [of the National Labor Relations Act] manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered "against the back-ground of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. 254,20 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context.

This test is accepted and applied by both the NLRB and the courts in related civil matters. The board in *Burns Meats Ltd.* went on to state the approach it thought Canadian boards of arbitration ought to follow in similar terms. At pages 386 and 387 it stated:

While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers, and do so in vivid and unflattering terms. Being at the forward edge of encounters with management, the shop steward become particularly vulnerable in the area of discipline. One study has found for example, that one-third of all disciplinary cases involving union stewards are for insubordination: see W. L. Leahy, "Arbitration and Insubordination of Union Stewards", 27 Arb. J. 18 (1972). This is substantially higher than the rate to be found among employees generally: see Adams, *Grievance Arbitration of Discharge Cases*, *supra*, p. 45.

If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be be [sic] muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above and by the Court in the *Linn* case disclose the standard to be applied. The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not

an absolute licence or an immunity from discipline in all cases. A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the *Labour Relations Act*, R.S.O. 1970, c. 232. Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management: *Re City of London*, *supra*. Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.

Applying this approach to the facts before it, the Board found that the grievor honestly believed what he said to be true although the board in no way endorsed his style or choice of words. The board concluded by writing (at page 389):

While the feelings of Mr. Anderson and Mr. Goetz in response to the newsletter are understandable, and the board in no way endorses the grievor's style and choice of words, the newsletter and the steward's account of the arbitration must be seen for what they are. Any union newsletter is in part a political pamphlet. It cannot be held to the standards of fairness and accuracy of a more disinterested publication. It should come as no surprise to the company that the union's account of the arbitration should be slanted in such a way to bring credit upon itself at the expense of the company and its officers. A thick skin has its place in industrial relations, and those who participate on either side must not be surprised to occasionally find themselves on the receiving end of a stinging verbal blow. Short of malice, such statements must be tolerated. Moreover, the company and its officers in this case were not entirely without recourse. If the company felt that the events had been critically misrepresented by the union it was free to publish and circulate to the employees its own account of what happened and the reason for what its officers said.

47. The statement of principle adopted in *Burns Meats Ltd.* can be traced in the United States from such early private sector cases as *NLRB v. Electrical Workers* (1953), 33 LRRM 2183 (Jefferson Standard case) to the more recent public sector equivalents such as in *Pickering v. Board of Education* (1967), 391 U.S. 563. See, for example, *Lynd, Employee Speech in the Private and Public Workplace: Two Doctrines or One?* (1977), 1 Indus. Rel. L.J. 711. If a trade union official publicly attacks an employer on non-labour relations issues, he breaches the duty of good faith and fidelity and the *Jefferson Standard* case supports the imposition of discipline or discharge. This is so even when the attack is to achieve a collective bargaining goal. See *Coca-Cola Bottling Works, Inc. and Retail, Wholesale and Department Store Union, AFL-CIO* (1970), 186 NLRB 1050. But if the statements relate to collective bargaining matters and are made without malice, the activity is protected under the *National Labor Relations Act*. It seems clear to us that an approach requiring malice draws its rationale out of a concern for the delicate nature of public comment. As noted in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 at 279:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., *Post Publishing Co. v. Hallam*, 59 F.530, 540 (C.A. 6th Cir. 1893); see also *Noel, Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875,892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone". *Speiser v. Randall*, *supra*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

48. It might be questioned why there should be any statutory or arbitral protection for public statements causing an employer rightful concern. It can be argued that public statements "politicize" collective bargaining and are inconsistent with the peaceful resolution of private contrac-

tual disputes. By providing protection, some persons may be encouraged to employ such tactics with an adverse affect on industrial peace. Unfortunately, as compelling as this argument may be, collective bargaining can impact the public and vice versa. This is particularly the case in public sector collective bargaining where there is often a clear nexus between public funds and collective bargaining issues. Accordingly, employers as well as trade unions often feel it necessary to speak out and inform the public about collective bargaining issues. Indeed, communication to the public in order to inform and gain support is the essence of picket line activity. And while each situation must be judged on its own peculiar facts, employers can also claim a statutory privilege under section 64 of the *Labour Relations Act* to speak out. See, for example, *The Journal Publishing Company Ottawa Ltd.*, [1977] OLRB Rep. June 309 at 321; and *Canada Cement Lafarge Ltd. v. United Cement, Lime & Gypsum Workers International Union, Local 368* (1980), 80 CLLC ¶16,075 at 14,662 et seq. Labour boards have been reluctant to involve themselves as the censor of public statements made in the context of collective bargaining negotiations on the understanding that such tactics have come to be part and parcel of that process. See *The Journal Publishing Company Ottawa Ltd.*, *supra*; *Noranda Metal Industries Limited*, [1975] 1 Can. LRBR 145 (BCLRB); *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77. We further note that in hospital collective bargaining this Board has already acknowledged the role and interest of a third party such as the Ministry of Health in collective bargaining issues. See *St. Joseph's Hospital*, [1976] OLRB Rep. June 255. Against this background, it would be naive and unduly restrictive not to acknowledge the legitimate role of public comment and media interest in the collective bargaining process, although we sense that public posturing is not always a constructive force in resolving labour and management disputes. See *The Corporation of the Borough of North York*, [1968] OLRB Rep. April 66. Undoubtedly, it was this reality of public sector bargaining that discouraged the respondent from objecting before this Board to the complainant writing to the Minister of Health or to holding the press conference in the first place. Indeed, counsel for the respondent made the specific point that the respondent had no objection to the Assessment Committee's report being made public provided that the complainant was accurate in its account of that document. What the respondent did object to, however, was the inaccurate comments of the grievor (and presumably Miss Gribben) relating to the death of Mrs. S.

34. In the *St. Catherines Hospital* case the Board concluded that the actions of the grievor were protected under the Act and that her activities amounted to lawful trade union activities under the Act. However, in concluding that the employer had not violated the Act the Board observed:

... However, it is of fundamental importance that the respondent did not itself impose a punishment on the grievor but instead invoked legal procedures available to it to cause the College of Nurses to review the grievor's conduct. The College is a statutory agency empowered to respond to such a complaint and entitled to impose sanctions on a nurse where such is appropriate. In our view, the filing of such a complaint could only be viewed as the imposition of a penalty or improper interference under the *Labour Relations Act* if the person filing the complaint did not hold a genuine belief that an offense or violation had been committed and was, instead, intent on forcing the grievor through the hardships of defending against such a charge. ...

The *St. Catherines* case dealt with a unique fact situation, one very different from the facts before us.

35. In the case before us the actions on the part of Mr. Michor to which the employer objects, are acknowledged by the employer to be protected trade union activities. We agree with the observations in *St. Catherines Hospital*, *supra*, that some balancing of interests in light of the purposes of the Act is required by the Board in cases of this nature. On the facts of this case, there are no allegations that Mr. Michor publicly vilified his employer or that he made statements to Ms. Hansen that were malicious or knowingly false. It is the fact and purpose of his visit to Ms. Hansen that the employer alleges constitutes a breach of the duty of fidelity. We agree with counsel for the employer that it is not for this Board to determine whether the actions of Mr. Michor constituted a breach of fidelity or constituted just cause for discipline. At the same time the employer acknowledges that the conduct which resulted in his discipline was conduct which is protected by the Act.

However, the employer also chooses to characterize this conduct as a breach of the duty of fidelity. It appears to us that whatever label the employer chooses to place upon the conduct, the fact still remains that the conduct is protected under the Act and therefore discipline is inappropriate. If we were to find that an employer is free to discipline a union official for engaging in a legitimate exercise of rights protected by the Act, simply by stating that the reason for the discipline was something else, the protection provided by the Act would be severely undermined. If the employer's argument is correct, then it would ensure that the employer, through the utilization of disciplinary sanctions, could define what is permissible or protected union activities.

36. The employer argues that it would have disciplined any employee who engaged in conduct similar to that of Mr. Michor and that his status in the union played no part in the decision to discipline. This argument begs the issue. It highlights the unlawfulness of the employer's actions. Mr. Michor was a union official and was disciplined for acting in that capacity. He was not just any employee but one who had the obligation to represent the union's membership. Whether any other employee would have been disciplined is irrelevant to the determination before us. An employer cannot justify disciplining a union official who is engaged in lawful activities under the Act by simply saying that if another employee engaged in similar conduct they would have been disciplined.

37. In addition, we do not accept the employer's position that the fact that Mr. Michor was a member of the union's executive played no role in its decision to discipline him. Mr. Pavelka's evidence is quite equivocal on this point and does not support the employer's position. In addition, the letter of warning makes numerous references to "the union" and concludes by saying "you and your union". The employer in issuing this discipline was sending a message to Mr. Michor both in his capacity as an employee and as a union representative and was thus clearly attempting to send a message to the union. Mr. Michor's status in the union was one of the motivating factors behind the discipline. We are satisfied that the employer was imposing this discipline because of Mr. Michor's union activities as a member of the union's executive, and that it intended to prevent Mr. Michor and other union officials from engaging in any such activities in the future.

38. In disciplining Mr. Michor in the circumstances of this case, the employer has intentionally interfered with the administration of the trade union. In disciplining Mr. Michor, the employer intended to silence the union on matters that the employer admits are protected. The employer's motivation was therefore improper and constituted an attempt to interfere with the trade union contrary to section 65 of the Act. The actions of the City violate section 65 of the Act. Mr. Michor has a statutory right protected by section 65 of the Act to engage in the activities for which he was disciplined, and the City breached the Act when it disciplined him for this conduct.

39. Accordingly, we therefore:

1. declare that the responding party has violated the *Labour Relations Act*;
2. direct that the discipline imposed on Mr. Michor be rescinded and the letter of June 24, 1992 be removed from his personal file.

DECISION OF BOARD MEMBER R. M. SLOAN; November 9, 1993

1. With respect I strongly dissent from the majority decision.

2. The issue before the Board is, in my view, quite simply - did the respondent, as alleged in the complaint, violate sections 3, 65, 67 and 71 of the *Labour Relations Act* ("the Act") in disciplining Mr. D. Michor for behaviour deemed by the respondent to be unacceptable in the dis-

charge of his duties as an employee? Did in fact Mr. Michor engage in activities that went beyond what was reasonable and appropriate in meeting his duty of fidelity to his employer? If so, did the employer have the right to discipline Mr. Michor for engaging in those activities?

3. Counsel for the applicant agreed that Mr. Michor did in fact engage in the activities for which he was disciplined; counsel for the applicant also conceded that employees do in fact have a duty of fidelity to their employers; and most significantly counsel for the applicant acknowledged that the disciplinary action taken by the employer was free of any anti-union motive.

4. The admissions of counsel for the respondent recorded in the foregoing paragraph should be enough to dispose of the complaint as it relates to Mr. Michor, through its outright dismissal.

5. The majority holds, in paragraph 25, that as Mr. Michor's activities were a legitimate exercise of his rights under the Act, discipline was not appropriate. With respect, I find that to be in contradiction with the jurisprudence of this Board, as set out in *St. Catherine's supra*, and as noted elsewhere in this dissent, that the right to participate in lawful union activities is not unlimited and that right does not sweep aside legitimate employer interests. The case law suggests that the appropriate approach is to balance the two competing interests, and indeed this was acknowledged by union counsel and by the majority in paragraph 34.

6. The Board noted in *St. Catherine's, supra*, that "an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer's business". Indeed, counsel or the union in the instant case admitted that an employer has a legitimate interest in ensuring that employees do not breach the duty of fidelity owed to the employer (see paragraph 26 of the majority decision).

7. In support of the general proposition that the right to pursue lawful or protected union activities is not unlimited and that by engaging in improper conduct an individual is not immune from disciplinary action, I cite the following:

Swingline of Canada Limited, [1971] OLRB Rep. Nov. 765, at paragraph 3.

Kitchener-Waterloo Hospital, [1977] OLRB Rep. Feb. 112, at paragraph 13.

International Wall Coverings, [1983] OLRB Rep. Aug. 1316, at paragraph 36.

8. Counsel for the respondent asserts that Mr. Michor was disciplined for conduct that clearly goes beyond what should be expected of a union representative in the exercise of his "union" function and is tantamount to interference in the legitimate right of management to discharge its responsibilities without being undermined by the improper activities of an employee.

9. Counsel for the applicant claims that Mr. Michor was engaged in an acceptable exercise of his "union" responsibilities and characterized Mr. Michor's activities as "lobbying" and suggested that if "lobbying" is not permitted then the union will lose an effective area in which they can legitimately represent the interests of their members.

10. It is clear to me that the efforts made by Mr. Michor to persuade the two volunteers to reject a proposition already agreed to by them cannot, by any reasonable interpretation, be considered to be "lobbying". The definition of lobbying in the usual and accepted sense which is the applying of pressure to elected officials. Counsel for the applicant, as recorded in the last sentence

of paragraph 27 of the majority decision supports the view that lobbying relates to dealings with "...representatives of the public, the City Alderman." It is clear from the agreed statement of facts that Mr. Michor had lobbied with respect to this issue previously on behalf of the union at a meeting of the Parks and Recreation Committee, with apparently no repercussions on either him or the union. By contrast, the two volunteers with whom he subsequently had discussions could by no stretch of the imagination be characterized as representatives of the public, and therefore those discussions cannot be characterized as lobbying.

11. The union is seeking to classify all "outside" contacts made by its officials as "lobbying" a leap which the Board should not accept. Otherwise, the door will be opened for the union and its officials to engage in all manner of "union" activities against which the employer would have no recourse.

12. The mere fact that Mr. Michor approached the two volunteers at all was a serious error in judgement, in my view. Calling at the home of Ms. Hansen after business hours; uninvited; unannounced; identifying himself (presenting his business card) as a union official; and proceeding to attempt to persuade her to withdraw an offer that had been made at the initiative of the volunteers themselves; are all facts that, in my view, establish that Mr. Michor strayed well beyond the bounds of acceptable conduct. The evidence would seem to suggest that Ms. Hansen was alone at the time of Mr. Michor's visit. It is not surprising then that as a result of his clearly intrusive behaviour Mr. Michor left Ms. Hansen's residence with an "amended" Dundurn Aviary Proposed Management Plan in which the volunteers would work only as advisors to assist the Aviary Technician, this, in clear repudiation of the Parks and Recreation Committee's decision. As Mr. Pavelka stated in his June 24, 1992 letter to Mr. Michor "...you engaged in activities which were clearly designed to subvert the will of the corporation as expressed by its elected leaders". On all of the evidence, I can readily agree with this assessment of Mr. Michor's conduct and conclude that the disciplinary action taken is appropriate under the circumstances.

13. Having assessed the behaviour of Mr. Michor, and finding such behaviour to be unreasonable and inappropriate - regardless of how well intentioned his motives might have been - the respondent had the right to impose discipline, a right which the Board should not deny the respondent in the circumstances of this case.

14. The other critical issue in this case is the employer's motive in disciplining its employee. The case law is clear that even where the activities of a union or its representative are lawful union activities protected by the Act, if the employer was in no way motivated by anti-union animus, they cannot be in violation of the Act. In *St. Catherines*, *supra*, quoted at length by the majority, the complaint was ultimately dismissed on the basis that the employer's actions "lacked the requisite anti-union animus necessary to support a violation of the Act. (Paragraph 52).

15. In this case, the employer asserts that Mr. Michor was disciplined for a breach of his duty of fidelity, and not any way because of his union affiliation. Counsel for the union acknowledged that the discipline was not motivated by an anti-union animus (see paragraph 28 of the majority decision). Given the agreement of the two parties on this critical fact, the majority's conclusion in paragraph 36 that the employer's motivation in disciplining Mr. Michor was to discourage union activities simply cannot be supported, and I strongly dissent from that finding.

16. In conclusion, based on the evidence and the submissions of the parties, I would find that the employer had legitimate reason to discipline Mr. Michor, which was not tainted by anti-union animus and that the employer was therefore not in violation of the Act.

17. I would accordingly dismiss the complaint.

2916-93-M; 2957-93-U The Great Atlantic & Pacific Company of Canada, Limited, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633, Brian Donaghy, Darrin Fay, Frank Fortunato, Rick Fox, Helmut Halla, Robert Liotti, Donald Lupton, Gene Martin, Pam Murdok, Patricia O'Doherty, Kathy Papaconstantino, Irene Park and Cliff Skinner, Responding Parties; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant v. The Great Atlantic & Pacific Company of Canada Limited, Responding Party

Picketing - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using prohibited replacement workers to perform work where employees on strike - Board making cease and desist order and directing that its decision be posted on outside of each struck store - Board declining company's request for restrictions on picketing under section 11.1 of the *Act* - Board noting that picketing had generally been peaceful, that section 11.1 contemplating some disruption without giving rise to restrictions, and that company made little attempt to utilize other means of assistance available to it

BEFORE: *Judith McCormack*, Chair.

APPEARANCES: *C. R. Robertson, T. K. Billings, D. Van De Kamer, T. Farber* and *J. R. Peardon* for the company; *Kelvin Kucey* for the union.

DECISION OF THE BOARD; November 25, 1993

1. These files include an application under section 11.1 of the *Labour Relations Act* brought by The Great Atlantic & Pacific Company of Canada Limited requesting restrictions on picketing, and a complaint filed by United Food and Commercial Workers International Union, Locals 175 and 633 alleging that the company has violated section 73.1 of the *Act* in using replacement workers. Because the parties requested a decision as soon as possible with respect to this ongoing labour dispute, the Board is issuing a bottom line decision, together with extremely abbreviated reasons in point form. Further and more extensive reasons will follow.

2. Turning first to the complaint in regard to replacement workers, I find on the basis of both the company's evidence and its admissions that it violated section 73.1 of the *Labour Relations Act* by using prohibited replacement workers to perform work at stores where employees are on a legal strike. As a result, I direct that the company cease and desist from conduct which violates section 73.1. I also direct that the company post this decision on the outside of each store on strike for a period of 14 days in locations where it will come to the attention of employees.

3. Turning next to the company's request for restrictions on picketing, I am not prepared to make any order in this regard. The test for imposing such restrictions under the *Act* is to prevent the undue disruption of the company's operations. Among other things, I have considered that:

- A. The picketing has generally been peaceful, the company has been able to bring its products through the picket lines in quite a number of stores, and there is no reliable evidence with respect to the vast majority of other stores.
- B. Section 11.1 contemplates some disruption without giving rise to restrictions, as long as it is not undue disruption.

- C. The estimates by the company of the value of the products it wishes to bring through the picket line have fluctuated significantly, they do not take into account the spoilage that has occurred over the last week, and they represent a relatively small fraction of the overall picture in the sense of being one to two days worth of products.
 - D. The company has asked that the fact that the products it wishes to bring through the picket line are highly perishable play no part in my decision.
4. In addition, section 11.1(5) is discretionary, and in this regard, I note:
- A. The company violated the *Labour Relations Act* by using prohibited replacement workers in some cases to pack up and load the products to bring them through the picket line.
 - B. In any event, the company made little attempt to utilize other means of assistance available to it for the most part, and even contributed to its own difficulties. In regard to this latter point, it originally tried to empty its shelves of perishable products to prepare for a strike. When a strike did not occur right away, it took a calculated risk and loaded up its shelves again with an unusually large shipment of perishable food, knowing that a strike was imminent and could occur at any time if a settlement was not reached.
5. For the clarification of employees, the issue I have decided is not whether the company has the right to remove its inventory, but whether the circumstances in this case warrant restrictions on picketing.
6. Finally, although this has played no role in my decision, I record for the parties' benefit the company's statement at the hearing that one of several possible destinations for the products it wished to bring through the picket line was a food bank. The union also made it clear that if it could verify that products were bound for a food bank, the picketers would be happy to assist the company in bringing the products out.

**2819-93-M International Brotherhood of Electrical Workers, Local 636, Applicant
v. The Hydro-Electric Commission of the City of Ottawa, Responding Party**

Combination of Bargaining Units - Interim Relief - Lock-Out - Remedies - Strike - Union seeking interim order prohibiting otherwise lawful strikes or lock-outs pending disposition of application to combine bargaining units -Board not finding reasons advanced for order sought sufficient to justify its imposition

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. A. Correll* and *P.V. Grasso*.

APPEARANCES: *P. Hunt* and *P. Routliff* for the applicant; *J. A. Emond* and *J. A. Lunney* for the responding party.

DECISION OF THE BOARD; November 29, 1993

1. This is an application for an interim order made pursuant to the provisions of section 92 (1) of the *Labour Relations Act*, which states:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

2. The "pending proceeding" to which this request for an interim order relates is an application made under section 7 to combine two bargaining units currently represented by the applicant union. These two units were referred to by the parties as the "office unit" and the "outside unit". The application under section 7 was made on November 12, 1993; no hearing dates have yet been set on the matter.

3. Both bargaining units have been in collective bargaining negotiations for most of 1993 to reach collective agreements to succeed those that expired (for both units) on March 31. In July, the office unit voted to approve a tentative agreement reached between the employer and the union. With respect to the outside unit, however, no agreement has been reached. In fact, as of November 18, 1993, the parties were in a legal strike/lock-out position. This strike or lock-out deadline was extended on mutual consent of the parties, in the form of a Board order prohibiting the use of any economic sanction, including lock-out or strike, for five days from November 17. This period has now expired.

4. The applicant seeks an order prohibiting either the employer or the union from engaging in any economic sanctions until the application under section 7 has been disposed of by the Board. The applicant clarified at the hearing that "economic sanctions" includes strikes and lock-outs, as well as changes to terms and conditions of employment that would no longer be prohibited under section 81 of the Act.

5. Upon hearing the representations of the parties and reviewing the materials before us, which include the application, the response and their accompanying declarations, the Board decides that it will not grant the order requested.

6. Based on the representations and materials, we are satisfied that the applicant has made out an arguable case on the "main" application for a combination of the two units. We make this assessment for the purposes of this interim order application, without in any way making any determination on the actual merits of the section 7 application and the factual disputes that arise hereunder, which will be for another panel to decide.

7. The applicant has asked that the Board preserve the *status quo* between the parties pending the determination of the section 7 application by prohibiting *otherwise lawful* resort to economic sanctions. There is no dispute that what the applicant seeks to prohibit would be otherwise lawful under the *Labour Relations Act*. There is no dispute that the parties are in a legal strike and lock-out position, and that the statutory freeze has now expired.

8. The employer asserts that it would be beyond the jurisdiction of the Board to prohibit by interim order what the Act itself makes lawful. We do not need to decide this because of our conclusion that it is not appropriate to make any such order here. We also do not need to decide the issues under section 96 of the *Constitution Act, 1867*. However, we are not convinced that the issue goes to our jurisdiction in any event. The Board's interim orders are often made in a context

where an action taken is *alleged* by a party to be unlawful, but may ultimately be determined to be lawful.

9. It is significant to our determination of the interim order request however, that there is not even an allegation that the actions sought to be prohibited are unlawful. Further, in our view, the harm that the applicant has identified in the event the order is not granted is far outweighed by the unusual and intrusive effect that this order would have on the process of collective bargaining as established by the Act. The applicant essentially asserts that the harm of not granting the order consists of the friction and divisions which would result from economic sanctions being taken with respect of one of two units, all of which might ultimately have been “unnecessary” depending on the results of the section 7 application. In the context of the undisputed legality of what is sought to be prohibited by this interim order, however, and the effect of this proposed relief on the ongoing process of collective bargaining, we do not find the reasons advanced for the order sufficient to justify its imposition.

1988-93-R Service Employees Union, Local 183, Applicant v. Transcor Inc., Responding Party

Certification - Evidence - Fraud - Membership Evidence - Union withdrawing earlier certification application after discovering that membership cards submitted to Board had been “pre-witnessed” by in-plant collector - Employer submitting that subsequent certification application “tainted” by continued participation of collector in organizing campaign - Irregularity in collection of membership evidence in first application not constituting “fraud” on the Board - Board finding no reason to doubt reliability of membership evidence filed in subsequent application

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Mark Wright, Lorne Richmond, and Norman C. Dunlop* for the applicant; *David Cote, Brian McLean, and Terry FitzPatrick* for the responding party.

DECISION OF THE BOARD; November 25, 1993

1. The style of cause is hereby amended to reflect the correct name of the responding party: “Transcor Inc.”.
2. This is an application for certification. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* (the “Act”).
3. The parties met with a Labour Relations Officer prior to the hearing of certain issues in dispute. The parties reached partial agreement with respect to the bargaining unit description. They are in dispute as to the appropriate geographic reference to be contained in the description. At the outset of the hearing the parties agreed to defer consideration of that issue pending resolution of the responding party’s objection to the membership evidence filed in support of this application.
4. We note that the Labour Relations Officer’s Report identifies a number of challenges to the list of employees in the bargaining unit, although it does not specify the nature of the chal-

lenges. Those matters are also deferred pending the resolution of the issue with respect to the membership evidence.

5. A hearing was convened before me to deal with the position of the responding party (the "company" or the "employer") that the Board cannot place any weight on the membership evidence filed by the applicant in this application and that the application ought therefore to be dismissed. The responding party further seeks the imposition of a bar to further applications for certification for a period of six months. It is the applicant's (or the "trade union") position that the membership evidence filed is reliable and, given the level of membership support disclosed, ought to cause the Board to issue a certificate.

6. This is the second application for certification filed by this trade union. An earlier application was filed on August 6, 1993 for this bargaining unit of employees. On September 1, 1993 early in the meeting with a Labour Relations Officer the applicant sought leave of the Board to withdraw that application and by decision dated September 1, 1993 the first application was withdrawn with leave of the Board.

7. This application was filed on September 15, 1993 and in support of that application new membership evidence was filed. Briefly, it is the position of the responding party that as a result of events occurring up to the filing of this application for certification, the membership evidence filed cannot be free from doubt as to whether it represents the true wishes of the employees involved. That history can be summarized as follows.

8. I note at this stage that the responding party provides school bus services. In addition it charters buses for specific trips. The bargaining unit sought by the applicant is, essentially, one of drivers.

9. The applicant appears to have commenced its first organizing campaign in the spring of 1993. At that time Mr. Babcock, then an employee of the responding party, was the key union organizer. Mr. Sedore, another employee, was also involved in the collection of membership evidence.

10. On March 23, 1993, Mr. Babcock and Mr. Sedore met with representatives of the responding party including Mr. FitzPatrick, the company's Vice-President. It would appear that Mr. Sedore requested the meeting for the purpose of discussing with the company some of the drivers' safety concerns. Mr. FitzPatrick had the Manager of Fleet Services, the person responsible for the operation of the vehicles, present. According to Mr. Babcock, that meeting did not go as well as he had hoped and he concluded that the company representatives were not interested in what he was discussing. It seems that notwithstanding the company's express position that it would not discuss matters involving the union's attempt to organize, Mr. Babcock tried to make that the primary topic for discussion.

11. At the conclusion of that meeting Mr. Babcock handed a sealed envelope to Mr. FitzPatrick, marked confidential. Contained in that envelope was a one page document titled "Job Description (Dispatcher)". Under that heading six items were set out, apparently referable to the duties to be assigned to this position. Following that is a title "wages". Seven points are then set out including an annual salary of \$45,000.00, a six percent annual increase, a company car equipped with cellular phone, credit card and other benefits. Points 6 and 7 of that list state:

6. No termination unless both parties agree or should the union gets [sic] in.

7. All of the above

Must be under a legal contract witnessed and signed by both parties involved.

12. At that time Mr. Babcock was employed as a driver on a part-time basis earning approximately eight to nine thousand dollars per year. Upon receipt of this letter, the company concluded that it was an attempt by Mr. Babcock to extort promises from it, and was being done at the expense of the rights of the employees. By letter dated March 31, 1993 Mr. Babcock was informed that as a result of his action in delivering these demands, the company was terminating his employment.

13. In response to that company action, the union filed a section 91 complaint on April 27, 1993 alleging that the company had terminated Mr. Babcock's employment by reason of his engaging in union activity. That complaint asserted that at the conclusion of the March 23 meeting Mr. Babcock provided Mr. FitzPatrick with a different list - one dated March 20, 1993 reflecting typical proposals that one would expect on behalf of the drivers (a copy of which was attached to the complaint). Mr. Babcock admitted that he led the union to believe that he had given Mr. FitzPatrick this list of demands as opposed to the list of personal demands and that in doing so he misled the union.

14. It is clear that Mr. Babcock was aware that the section 91 complaint did not accurately reflect events and that he allowed the complaint to be filed in any event. The union withdrew the section 91 complaint by letter dated May 5, 1993.

15. Mr. Babcock testified that he believed that he had told Mr. Dunlop, the union's staff representative, that he had given the company the list of personal demands at the time of his termination. That evidence was not challenged by Mr. Dunlop and the company asked that I draw the conclusion that the union was therefore aware prior to the filing of the section 91 complaint that Mr. Babcock had attempted to obtain these demands from the employer. It was the company's further position that the filing of the section 91 complaint by the trade union in those circumstances amounted to an attempt to deceive the Board and was characterized by the company as a fraud on the Board.

16. I am not persuaded that I ought to place much, if any weight on the evidence of Mr. Babcock as to whether or not Mr. Dunlop was aware of the false information forming the basis of the section 91 complaint. Mr. Babcock was at times unresponsive in his evidence and his answer with respect to the question of Mr. Dunlop's knowledge was in itself somewhat ambivalent and appears to contradict other of his evidence. While it is true that the evidence went uncontradicted, that occurred while Mr. Dunlop was acting on behalf of the union and I am not persuaded that it would have been apparent to Mr. Dunlop at the time that it was potentially a matter to be addressed by him. While I agree with counsel for the employer that a party must take responsibility for the risks that may arise by choosing to appear without counsel, the allegation is serious and warrants a finding only on the basis of evidence that is both clearer and more cogent than Mr. Babcock's. I note as well that the section 91 complaint was withdrawn very soon after it was filed. I note there is no evidence to support a conclusion that Mr. Sedore was aware of the contents of the envelope.

17. The membership card used by the applicant reads as follows:

APPLICATION FOR MEMBERSHIP

Service Employees Union Local 183

I hereby request and accept membership in the Service Employees Union, Local 183 and hereby

authorize such organization to be my exclusive collective bargaining agent. I agree to be bound by the Constitution and By-Laws of the International and the Local Union.

Signature of Applicant sign here

Signature of Witness sign here

Date 19.....

18. Mr. Babcock and Mr. Sedore acted as witnesses in the collection of cards for the first certification application. That application was withdrawn by the union on September 1, 1993 when it came to the union's attention that membership cards were "pre-witnessed", in the sense that the witness signed the card prior to the applicant for membership signing the card. The union acknowledged that on their face the membership cards purported to be something they were not, and that this affected the reliability of those cards. Therefore the application was withdrawn. There is no evidence from which it can be concluded that this was an intentional attempt to mislead the Board.

19. As set out earlier, the union then proceeded to have employees complete new membership cards. Mr. Sedore and Mr. Dunlop acted as witnesses in the collection of the membership evidence in respect of this, the second application for certification. There is no evidence to support the conclusion that Mr. Babcock had any involvement in the collection of membership evidence for this application, although he did continue to be involved as a union supporter in the campaign, even though he was no longer employed by the company.

20. There is no evidence of any improprieties of any sort in the collection of the membership evidence in this application for certification. Nor is there any evidence of intimidation or coercion or the like.

21. It was the position of the responding party that the Board could not be satisfied as to the reliability of the membership evidence filed in this application based on two categories of irregularities. The employer relies on the conduct of Mr. Babcock in respect of the section 91 complaint, and secondly, the fact of the improperly witnessed cards having been collected by the union in the first application. It is the position of the employer that in addition to obtaining new membership evidence, the only way for the union to have purged these historical problems was to ensure that different individuals acted as witnesses on behalf of the union. It was the company's position that it was incumbent on the union to assure the Board that it had instituted safeguards in its procedures for the collection of membership evidence in this application given the earlier conduct. The company argued that it was incumbent on the union not only to keep Mr. Babcock away from the collection of new membership evidence but to keep him out of the organizing campaign in all respects. In support of its position the responding party relies on *Grand and Toy*, [1986] OLRB Rep. Sept. 1223, *Hydro Electric Commission of Hamilton*, (1958), 58 CLLC 1738, *The Ontario Hospital Association*, [1979] OLRB Rep. Mar. 243, *Flo-Con Canada Inc.*, [1989] OLRB Rep. July 752, *Crock and Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424, *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37 and *Reimer Express*, [1981] 1 Can. LRBR 336, a decision of the Canada Labour Relations Board, and the cases cited in those decisions.

22. In response, the union did not take great issue with the cases referred to. It argued however that in light of there being no evidence of any impropriety of any kind concerning the collection of the membership evidence in this application in circumstances where that evidence had been

newly obtained, no "taint" could attach to the reliability of this membership evidence from the historical events. It was the union's position that Mr. Babcock's earlier conduct, which it did not condone, could not affect the issue of whether or not the Board could rely on the membership cards filed in this application. To the extent there had been a problem with the collection of the membership evidence in the first application there was no evidence to support the conclusion that it was intentional conduct. The union had acted properly in its view by withdrawing that application and seeking to have new membership evidence filed. The union was of the view that the employer's assertion that only new individuals ought to be involved was unrealistic and was unnecessary. It further noted that to the extent there had been a problem in the collection of the membership evidence in the first campaign, it had been conduct of rank and file organizers as opposed to any union official or staff representative.

23. The union asked me to consider the fact that the old Form 9 under the old legislation has been amended to become Form A-4 and that there is no longer any requirement on the part of the union to conduct inquiries of those persons collecting the membership evidence. In response the employer noted that that only strengthened its argument and required the Board to be even more vigilant in its review of the membership evidence.

24. Although the employer urged me to impugn the membership evidence filed in this application on the basis that Mr. Babcock had continued to participate in the organizing campaign even in light of his earlier conduct, I am not persuaded that that is appropriate. The fact of his mere participation in the second certification application is insufficient in the absence of any allegations of any impropriety to raise any doubt with respect to membership evidence filed, in circumstances where he did not witness any of that membership evidence. Mr. Babcock's conduct throughout the organizing campaign cannot in the circumstances, reflect on the reliability of the membership evidence filed.

25. To the extent that there is any connection whatsoever between the membership evidence filed in the second application for certification to any prior conduct on the part of the union is the fact that Mr. Sedore was a witness in respect of cards signed in both applications. It was acknowledged by the union that in the first application for certification, through the use of "pre-witnessed" cards, membership evidence was filed with the Board that purported to be something that it was not. On that basis the first application for certification was withdrawn. There is no evidence that in the first application for certification Mr. Sedore intended to mislead the Board. There is no suggestion that the union used "pre-witnessed" cards in this application. There is no evidence of any impropriety or irregularity regarding these new membership documents.

26. In *Hydro Electric Commission of Hamilton, supra* a first certification application was made by the local union. That short decision discloses that at the hearing the union representative assured the Board as to the regularity of the payment of dues in connection with the applications for membership that had been filed. This would correspond to the requirement under the old Form 9. Subsequently, two non-pay allegations came to the attention of the Board and following its usual investigation a further hearing was held. At that time counsel for the union advised the Board of certain circumstances (which are not disclosed in the decision) concerning the allegations of non-pay, and requested leave to withdraw the application. The Board dismissed the application, noting that in doing so it was following its usual practice and noting that the Board would, should another application be filed, entertain any representations of the parties with regard to the "timeliness" of that application.

27. Some three months later a second application for certification was filed although this

time it was brought by the parent international union. At the hearing the union representative gave assurances to the Board as to the regularity of the payment of dues in connection with the membership documents filed. The membership evidence submitted was new. The union did not rely on any of the documents filed in the earlier application.

28. In concluding that it was necessary to order a representation vote in the second application the Board stated:

... although the applicant in the instant case is the International itself, whereas the applicant in the earlier case was Local 138 of the International, and although the evidence of membership submitted in the instant case is fresh evidence and not merely a refiling of the evidence submitted in the earlier case, nevertheless, in view of the circumstances in which the request for withdrawal in the earlier case was made, there is a cloud on the documentary evidence in this case.
...

29. Although not entirely clear from the decision, it would appear that those circumstances included concerns about two non-pays and their effect on both the documentary evidence filed and on the assurances made to the Board by the union at the hearing (or what could later be described as a problem with the Form 9 Declaration).

30. Apart from the *Hydro Electric Commission of Hamilton* case there is reference to a decision in *Echlin United of Canada Limited*, 1965) OLRB Rep. May 91 where the Board ordered a vote because of a "cloud" on the membership evidence filed in a second application. In that case there had been an earlier application for certification that had been withdrawn in the face of an indication of deficiencies in the completion of the Form 9 Declaration. Shortly afterward the trade union filed a second application, filing evidence of membership in the form of resigned application cards in blank. These new cards did not indicate any payment of money. The original membership cards were the only membership documents to so indicate any payment of money. It is clear that in that case the union was attempting to rely on both sets of membership evidence, notwithstanding that the earlier evidence had been found to be deficient. As a result, the Board ordered a representation vote.

31. In the *Ontario Hospital Association*, *supra*, again, alleged irregularities in membership evidence in a first application were dealt with in the context of later submitting a new application with new membership evidence. In that case rank and file organizers had apparently signed as collectors of the one dollar payment although they had not in fact been the actual person receiving the dollar. There was no suggestion that a dollar had not been collected from the employee applying for membership. In effect the card purported to reflect that the person signing as collector of the dollar payment had in fact actually received the dollar, when another person on behalf of the union had done so. Allegations had initially been raised in the company's reply to the application for certification, and upon investigation by the union, it sought leave to withdraw the application. The employer opposed the request to withdraw and sought the imposition of a bar. In dismissing the application without a bar the Board again stated that the dismissal would not preclude the employer from raising relevant allegations of improprieties in the future. Approximately four months later a second application was filed with fresh membership evidence.

32. The Board distinguished the *Hydro Electric Commission* case on the basis that it had involved some evidence of fraud being practised on the Board. The Board stated:

13. ... Instances of non-sign and non-pay with respect to evidence of membership have always been regarded by the Board as a fraud practised against the Board. Such instances of fraud have always been regarded by the Board as more serious than other conduct with respect to evidence of membership. Clearly in the *Hydro Electric Commission of Hamilton* case, the Board, as a result of the fraud which had apparently been practised on it, determined that a cloud remained

on fresh evidence of membership which was submitted by an international trade union rather than one of its local trade unions. In the instant application the Board is asked to consider the effect of allegations with respect to evidence of membership which had been filed in a previous application. *The admissions by the applicant in the previous application do not amount to fraud.*

(emphasis added)

33. I note the Board's last comment. In the *Ontario Hospital Association* case the Board did not consider as amounting to a fraud on the Board, circumstances where the membership evidence disclosed that a dollar had been paid and received by a particular individual when, although the dollar had been received, it had been by another individual. The primary concern of the Board in those circumstances was the assurance that the dollar payment was in fact made by the employee applying for membership.

34. The characterization of conduct as fraud in the Board's caselaw, has referred to non-pay and non-sign allegations, which fraud may or may not have been carried through to taint the old Form 9 Declaration. For example, in *Crock and Block, supra*, even though the Board concluded that a non-pay allegation had been made out, it specifically noted that no Form 9 problem arose as the union organizer had made the necessary inquiries prior to signing the Form 9. It was the conduct of the individual in failing to collect a dollar from the applicant for membership that troubled the Board and caused it to order a representation vote.

35. The collection of the dollar payment is no longer required. It continues to be the case, as the Board has said in the past, that it is prudent for a trade union to provide an independent confirmation of an employee's signature to a membership card through the use of a witness attesting to that signature on the card.

36. The Board in the *Ontario Hospital Association* case, *supra*, concluded that:

15. ... There is no evidence of any intention to mislead the Board. The admissions of the applicant in counsel's letter dated September 8, 1978, relate to irregularities caused by persons who are not representative of the applicant. There is nothing in the material before the Board which indicated fraud on the Board. In our view, there is nothing in the nature of a cloud on the fresh evidence of membership filed in the instant application. No allegations of improper or irregular conduct have been filed with respect to the fresh evidence of membership and the Board does not find it necessary to seek the confirmatory evidence of a representation vote.

The Board certified the applicant in that case based on the cards filed.

37. The most recent decision of the Board dealing with the issue of the filing of a second application for certification containing fresh membership evidence is *Flo-Con Canada Inc., supra*. In that case the union had withdrawn its first application for certification following allegations of one non-pay and numerous charges of intimidation, coercion, and misrepresentation with respect to the collection of the membership cards. Approximately three weeks later the union filed a second application for certification, together with fresh membership evidence.

38. The employer sought to rely on the allegations made in the first application both with respect to intimidation, coercion, and misrepresentation in the collection of the membership evidence and additional allegations of impropriety in obtaining the membership cards. There were no allegations of non-pay or non-sign with respect to any of the fresh cards nor any allegations with respect to the Form 9 Declaration before the Board. The Form 9 declarant was the same person in both applications.

39. In the first application an individual named Gorman had committed a non-pay, follow-

ing which the application had been withdrawn. Gorman was not a collector of any of the fresh cards in the second application nor was there any evidence that he was involved in any aspect of the collection of the new cards.

40. The Board heard evidence concerning certain alleged improprieties. The employer argued that the fresh membership evidence remained under a cloud, given the non-pay and Form 9 problems in respect of the first application. The employer argued that the applicant had committed a fraud on the Board in the first application and should not be allowed to escape the consequences of such behaviour by withdrawing it and filing a second application. In support of its position, the employer in that case also relied on the *Hydro Electric Commission of Hamilton* decision and the *Ontario Hospital Association* decision referred to earlier.

41. In concluding that it would not exercise the discretion to either dismiss the application or order a representation vote based on the earlier application involving a non-pay, the Board reviewed some of the cases following the *Ontario Hospital Association* decision as follows:

9. Secondly, the respondent alleged that the applicant union committed a fraud upon the Board with respect to the first application, and ought not to be allowed to benefit from such fraudulent behaviour by the mechanism of withdrawing the first application. No bar was imposed upon any subsequent application at the time the first application was withdrawn. Nor do the facts suggest that the Board ought to have imposed a bar with respect to the first application. (See, for example, *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441, *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531. Consequent upon that withdrawal, the applicant filed a new certification application, together with entirely new membership evidence. None of these cards involved the activities of Gorman, the person who had been responsible for the non-pay of a card in the first application. No allegations were filed with respect to any of this membership evidence nor with respect to the Form 9 declaration. This new membership evidence is satisfactory in all respects, and demonstrates support for the applicant in excess of fifty-five per cent of the employees in the bargaining unit.

10. The Board stated in *Leco Industries Limited*, *supra*:

9. The argument made by the respondents in the present case is virtually identical to that considered, and rejected, by the Board in the very recent decision in the *Ontario Hospital Association* (Board File No. 1772-78-R), decision dated March 14th, 1979 - as yet unreported. There, too, the respondent argued that, because of certain allegations which had been made in a previous application, the Board should exercise its discretion to order a representation vote in a subsequent application. At paragraphs 9 and 10 of the *Ontario Hospital Association* decision the Board summarized the argument as follows:

9. The respondent argued that the Board relies upon Form 8 [now Form 9], Declaration concerning Membership Documents, and the evidence of membership filed by the applicant. The respondent stressed that Form 8 is to be completed on the basis of knowledge (including inquiries), information and belief and argued that Form 8 had been signed negligently and erroneously. On this basis the Form 8 filed in File No. 0718-78-R was characterized as inaccurate, false and misleading. In these circumstances, the respondent argued that there is a cloud on the evidence in the instant application (even if new evidence of membership has been filed) which may only be dissipated by a representation vote in the instant application.

10. The central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in one application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which involved the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. In view of this very recent Board decision, which contains a review of the authorities, it is unnecessary for the Board to repeat that review in the present case. Suffice to say that the Board adopts the reasoning and analysis of the panel in the *Ontario Hospital Association* case, as well as its conclusion that no representation vote should be ordered in these circumstances. Whether or not the Board can resort to evidence given before it at previous certification hearings when the panel was differently constituted (in this regard see *R. v. OLRB, ex parte Trenton Construction Workers Assoc.*, [1963] 2 O.R. 376 and, more recently, *Radio Shack* [1978] OLRB Rep. No. 1043) we are not persuaded that the allegations in the present application are of such kind or character as to prompt the exercise of our discretion to impose a bar or order a representation vote. There is no allegation before the Board in the present case with respect to any impropriety in the evidence presently before us. Nor, as we have already pointed out, is there any evidence of irregularity or misconduct in the previous application. In the circumstances, therefore, the Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on the 9th April, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *The Labour Relations Act*, to be the time for purpose of ascertaining membership under section 7(1) of the said Act.

11. In *Duracon Precast Industries Ltd.*, [1981] OLRB Rep. Jan. 22, the Board wrote:

9. As the Board pointed out in the *Ontario Hospital Association*, case, [1979] OLRB Rep. March, p. 243, in the circumstances of the instant application, the central question to be considered by the Board is whether the conduct of the applicant with respect to evidence of membership in an earlier application may cause the Board to seek the confirmatory evidence of a representation vote in a subsequent application for certification which invokes the same employer, the same trade union and, to all intents and purposes, the same bargaining unit.

10. The applicant has disclosed to the Board the nature of the irregularity with respect to the evidence of membership in Board File No. 0997-80-R. The nature of the irregularity arose because of the conduct of an employee which subsequently became known to the applicant. There is nothing to indicate that the applicant attempted to mislead the Board. The respondent relied on decisions of the Board in the *Hydro Electric Commission of Hamilton* case, 58 CLLC ¶18,120, and in the *Echlin United of Canada Limited* case, [1965] OLRB Rep. May, p.91, in support of its proposition that a representation vote should be conducted by the Board. Those two cases involved attempts to mislead the Board and the Board directed a representation vote in each case. These two cases are distinguishable from the instant application in that there has not been a finding by the Board of any intention to mislead the Board. In addition, on the representations before it, the Board is not prepared to find that the applicant had any intention of misleading the Board in the earlier application for certification in Board File No. 0997-80-R.

11. The respondent has stated that there is a heavy onus on the applicant to satisfy the Board that the membership evidence is fresh and entirely without irregularity. The applicant has filed fresh evidence of membership in the instant application. The respondent has not suggested how the applicant would satisfy the requirement of being "entirely" without irregularity" having regard to the provisions of section 100 of the Act. The respondent has not alleged, and the Board's examination does not disclose, any irregularity in the evidence of membership filed by the applicant. The Board is not prepared to find in the circumstances of the instant application either that there has been an abuse of the Board's procedures by the applicant or that there is a taint in the evidence of membership in the instant application.

12. The applicant has filed a duly completed Form 8, Declaration concerning Membership Documents. This declaration has been completed on the basis of fresh evidence of membership and there is no indication before the Board that the declarant

[sic] either in the earlier application or in the instant application did not complete the declaration to the best of his knowledge, information and belief.

13. Having regard to the foregoing, the Board is satisfied that it is not necessary for the Board to seek the confirmatory evidence of a representation vote in this application. The Board notes that the applicant has withdrawn its request that the Board invoke its powers pursuant to section 7a of the Act.

12. And in *Barouh Eaton (Canada) Ltd.*, unreported, March 4, 1985, Board File #2883-84-R, the Board wrote:

6. Counsel for the respondent argued that the Board should order a representation vote in the circumstances of this case because the applicant had sought leave to withdraw an earlier application for certification in respect of this respondent during the course of the hearing in that proceeding in which testimony about certain improprieties in the membership evidence filed in that case had been led. The Board in that case had dismissed the application for certification. There were allegations filed by the respondent about harassment of employees in both that earlier proceeding and in the instant matter. The application in the first proceeding had been dismissed before the allegations of harassment could be considered by the Board. Counsel for the respondent did not attempt to lead any evidence of harassment at the hearing in this matter, but had requested that the Board appoint a Labour Relations Officer to investigate those allegations, and, depending on the result of that investigation and report of the officer, schedule another hearing to deal with the allegations. The Board, following its usual practice, did not appoint an officer to conduct the requested investigation. The Board received detailed submissions from counsel for the respondent and from counsel for the applicant as to whether the Board should order a representation vote in these circumstances. The representatives of the group of objecting employees were given the opportunity to make submissions, but chose not to do so. After hearing the submissions, the Board recessed and then returned to issue the following oral ruling:

The Board is not satisfied that the circumstances existing in this case should cause the Board to depart from its normal practice of requiring a party making allegations of improper conduct to particularize those allegations and call evidence at the Board's hearing.

Since the membership evidence filed in support of this application is fresh membership evidence, we find that the principles discussed by the Board in the *Ontario Hospital Association* case, [1979] OLRB Rep. March 243 and the *Leco Industries Limited* case [1979] OLRB Rep. May 404 are applicable here, and that there is no cloud on that membership evidence.

Thus, we are not persuaded that we should order a representation vote in this matter.

42. In *Flo-Con Canada Inc.* the Board accepted the new membership evidence filed even though the first application had been withdrawn because of a non-pay. The employer here argues that the Board's conclusion in *Flo-Con Canada Inc.* is based on the fact that the union used different individuals to collect the new membership cards thereby reassuring the Board of its veracity. While that was a fact that the Board considered the decision concludes:

13. We adopt the approach taken by the Board in these and numerous other decisions of the Board. The only irregularity or misconduct of which we either have evidence or a concession by the applicant is with respect to one card filed in support of the first application: the employee who had signed the card had not paid a dollar as the card suggested he or she did. This does not clearly point to any impropriety or attempted fraud on behalf of the union or the Form 9 declarant nor does it cast a cloud on the fresh membership evidence. *We are not disposed to exercise*

our discretion and either dismiss this application or order a representation vote simply because one card in an earlier application involved a non-pay.

[emphasis added]

43. This case can also be contrasted with the *Hydro Electric Commission* case or the decision in *Flo-Con Canada Inc.* where the first applications had been withdrawn because of non-sign or non-pay concerns. There is no evidence of any improper conduct on the part of the union in the collection of this fresh membership evidence. Nor did the conduct in the prior application amount to non-sign or non-pay issues. (I note that based on this latter distinction the decision in *Flo-Con Canada Inc.* does not follow the *Hydro Electric Commission* decision).

44. The circumstances here most closely resemble those in the *Ontario Hospital Association* case. The “pre-witnessing” of cards is conduct similar in nature to attesting to the receipt of the dollar payment although not collected by that person. As indicated earlier, the Board in the *Ontario Hospital Association* case did not consider that conduct to amount to a fraud on the Board. More to the point, it did not view the conduct in the first application as having any effect on the membership documents filed in the second application in circumstances where that new evidence was itself not impugned in any way.

45. In assessing the reliability of the cards filed the Board need be confident that the person whose name is reflected on the card actually signed the document and has thereby indicated their wishes with respect to union representation. The signature of a witness provides at best, confirmatory evidence. In the absence of any impropriety of any nature with respect to the new membership evidence filed there is no basis for exercising the discretion to order a representation vote or to dismiss the application and I decline to do so.

46. There remains to be determined the issues noted at paragraphs 3 and 4 of this decision. The parties are hereby directed to meet forthwith with a Labour Relations Officer for the purpose of attempting to resolve any and all remaining issues in dispute in this application, in light of the documentary evidence of membership filed, failing which the matter will be set down for hearing on an expedited basis.

47. This matter is referred to the Manager of Field Services.

COURT PROCEEDINGS

0013-90-JD (Court File No. 352/93) United Brotherhood of Carpenters and Joiners of America, Local 1256, Applicant v. **Vic West Steel Limited**, Ontario Sheet Metal Workers’ and Roofers’ Conference, Sheet Metal Workers International Association, Local 539 and Ontario Labour Relations Board

Adjournment - Construction Industry - Evidence - Judicial Review - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Witness - Carpenters’ and Sheet Metal Workers’ unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers’ union - Board summarizing various evidentiary and procedural rulings made dur-

ing lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Sheet Metal Workers' union moving to strike affidavit filed by Carpenters' union in judicial review application - Divisional Court dismissing motion to strike affidavit

Board decision reported at [1993] OLRB Rep. March 256

Ontario Court Of Justice (Divisional Court), White J., November 3, 1993.

White J. (endorsement): This is an application to strike out the affidavit of Norman L. Jesin sworn 26 May 1993. The affidavit deals with proceedings before the O.L.R.B. in respect of a jurisdictional dispute between two unions. The issue is whether that affidavit is admissible before the Divisional Court.

Affidavit evidence is not admissible on judicial review if there was any evidence before the statutory tribunal on which it could base its finding of course in the hearing before the OLRB. There is ample evidence on which the OLRB could base its findings and insofar as the affidavit deals with the substantive facts before the Board it is not admissible. The affidavit however purports in certain paragraphs to indicate unfairness on the part of the OLRB is not permitting the respondent union to adduce relevant evidence. Whether such indicated unfairness goes to the declining of jurisdiction or denial of natural justice to the degree of depriving the OLRB of jurisdiction is not for me at this time to decide; the decision on whether anything in the affidavit goes that far is entirely for the panel of the Divisional Court which hears the application of judicial review on its merits.

Since the affidavit is capable of being applied by the Divisional Court to the issue of whether the OLRB declined jurisdiction or denied the respondent union natural justice; and since the affidavit is not limited in its application only to the issue of whether there was any evidence before the OLRB on which it could make its findings; then such cases as *Keeprite Washers Independent Union et al. v. Keeprite Products Ltd.* (1986) 29 OR (2nd) 513 & *Re Securicor Investigations & Security v. OLRB* (1985) 50 OR (2nd) and other such cases relied upon by the applicant are not precisely on point.

Such cases as *McCoshan Storage & Distribution Co. (Sask.) Ltd. v. Canadian Brotherhood of Railway Employees et al.* 13 D.L.R. (2d) 246 and *Piggott Const. v. Carpenters and Joiners* 39 D.L.R. (3d) 311 and *Northumberland Corporation Appeal Tribunal v. Shaw* [1952] 1 KB 338, indicate that affidavit evidence is admissible as to facts upon which a court might base a decision that there has been a denial of natural justice.

Notwithstanding that the affidavit does touch upon the facts that were in issue before the OLRB its preponderant information content goes to the issues of declining jurisdiction and denial of natural justice in the way the OLRB conducted the hearing and at this stage I do not think that the respondent could effectively mount an attack on the OLRB's jurisdiction based on a declining of jurisdiction and a denial of natural justice absent such affidavit.

What I have said above should not be construed as indicating that I think the affidavit is persuasive on the OLRB's lack of jurisdiction that being for the Divisional Court itself to decide, since the OLRB is master of its own house procedurally and is entitled to err in the reception or rejection of evidence provided it errs in a way not patently unreasonable.

For these reasons this application to strike out the affidavit of Mr. Jesin is dismissed.

The costs of this application are fixed at \$1,000.00 are reserved to the panel of the Divisional Court which hears the application for judicial review (in respect of disposition).

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3998-91-R: Ontario Nurses' Association (Applicant) v. Pembroke Civic Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Pembroke Civic Hospital in the City of Pembroke, save and except Nurse Manager, person above the rank of Nurse Manager and persons regularly employed for not more than 24 hours per week; and all registered and graduate nurses employed in a nursing capacity by the Pembroke Civic Hospital in the City of Pembroke regularly employed for not more than 24 hours per week, save and except Nurse Managers and persons above the rank of Nurse Manager" (38 employees in unit)

3531-92-R: Labourers' International Union of North America, Local 607 (Applicant) v. Cando Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of Cando Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Cando Contracting Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

3765-92-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Corporation of the Town of Innisfil (Respondent)

Unit: "all employees of the Corporation of the Town of Innisfil in the Town of Innisfil, save and except supervisors, persons above the rank of supervisors, Secretary to the Chief Administrative Officer, Secretary to the Clerk and Mayor, Records Management Coordinator, Chief Waterworks Operator, Recreation Program Instructors, Rink Attendants, Rink Concession sales staff, students employees in a co-operative training program, students employed during the school vacation periods and persons for whom any trade union held bargaining rights as of March 25, 1993" (25 employees in unit) (*Clarity Note*)

0047-93-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: "all employees of Wackenhut of Canada Limited in the City of Ottawa, City of Vanier, City of Nepean, City of Kanata, City of Gloucester and the village of Rockcliffe, save and except supervisors, persons above the rank of supervisor and employees who regularly work for not more than 24 hours per week and students employed during the school vacation period, office, clerical and sales staff" (220 employees in unit) (*Clarity Note*)

0180-93-R: Canadian Union of Public Employees (Applicant) v. Marriott Management Services (Respondent)

Unit: "all employees of Marriott Management Services employed at Queen's University in the City of Kingston regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Managers, Chefs, Cooks, Bakers, Cafeteria Supervisors, Student Managers, Assistant Student Managers, and persons above such rank, clerical, office staff or any person who exercises managerial functions or who is employed in a confidential capacity in matters relating to labour relations" (155 employees in unit) (*Having regard to the agreement of the parties*)

1307-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. Canadian Security Union (Intervener)

Unit: "all Security Guards employed by Group 4 C.P.S. Limited at the Photo Engravers and Electrotypers work site at 2250 Islington Avenue in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

1390-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Clarence McDonald Excavation Ltd. (Respondent)

Unit: "all employees of Clarence McDonald Excavation Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foreperson and persons above the rank of non-working foreperson" (4 employees in unit)

1458-93-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Conego Construction Ltd. (Respondent)

Unit: "all electricians and apprentice electricians in the employ of Conego Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and apprentice electricians in the employ of Conego Construction Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1481-93-R: United Steelworkers of America (Applicant) v. The Knechtel Corp. c.o.b. Chatham IGA (Respondent)

Unit: "all employees of The Knechtel Corp. c.o.b. Chatham IGA in the City of Chatham, save and except Store Manager and persons above the rank of Store Manager, Assistant Store Manager, Head Cashier and Produce Manager" (36 employees in unit) (*Having regard to the agreement of the parties*)

1592-93-R: Labourers' International Union of North America, Local 247 (Applicant) v. Crane Canada Inc. (Respondent)

Unit: "all employees of Crane Canada Inc. at its Crane Supply Division in the City of Kingston, save and except Branch Manager, persons above the rank of Branch Manager, office, clerical, sales and technical staff" (3 employees in unit)

1740-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at Mississauga Hospital, 100 Queensway West, in the City of Mississauga, save and except supervisors and persons above the rank of supervisor" (13 employees in unit) (*Having regard to the agreement of the parties*)

1839-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. George Herczeg Ltd. (Respondent)

Unit: "all employees of George Herczeg Ltd. engaged in cleaning, maintenance and security services in the City of London, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

1843-93-R: Labourers' International Union of North America, Local 1267 (Applicant) v. Laidlaw Transit Ltd. (Respondent)

Unit: "all employees of Laidlaw Transit Ltd. at 120 Doncaster Avenue in the Town of Markham, save and except supervisors, safety training officers, office and clerical employees and persons for whom any trade union held bargaining rights as of September 8, 1993," (7 employees in unit) (*Having regard to the agreement of the parties*)

1855-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Annaterr Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Annaterr Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Annaterr Construction Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1866-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, truck drivers and construction labourers, in the employ of Grant Paving & Materials Limited in the Townships of Gillies Limit, Coleman, Lorrain, South Lorrain, Brigstock and Best, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

1873-93-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent)

Unit: "all employees of the Marriott Corporation of Canada Ltd. engaged in food services at Metro Hall, 55 John Street, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff and casual banquet staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

1900-93-R; 1901-93-R; 1903-93-R; 1904-93-R; 1905-93-R; 1906-93-R; 1907-93-R; 1909-93-R; 1911-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) v. The Canadian Union of Professional Security-Guards (Intervener)

Unit: "all security guards of Intertec Security & Investigation Ltd. at 555 Richmond St. W., 701, 705 & 725 King St. W., 40 Scollard St., 94 Cumberland St., 1240 Bay St., 2525 St. Clair Ave. W. in the City of Toronto, the City of North York, 85 & 95 Thorncliffe Park Dr., 205 Wicksteed Ave. in the Borough of East York, the City of Vaughan and the City of Etobicoke, save and except patrol supervisor, persons above the rank of patrol supervisor, dispatchers, office, clerical and sales staff and security guards of the responding party at 195 Belfield Rd. in the City of Etobicoke and 155 Gordon Baker Rd. in the City of North York" (4 employees in unit) (*Having regard to the agreement of the parties*)

1914-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. at 400-410-430 Neilson Road in the Municipality of Metropolitan Toronto and at 900 Steeles Avenue West in the City of Vaughan, save and except patrol supervisors and persons above the rank of patrol supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

1919-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all Security Guards of Intertec Security & Investigation Ltd. working at 740 Ellesmere Road, in the

Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

1920-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: “all security guards of Intertec Security & Investigation Ltd. working at 155 Gordon Baker Road in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1931-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: “all employees of Domclean Limited at 10 Cuddy Boulevard West, in the City of London, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1932-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. J. & W. Corp. o/a ServiceMaster Contract Services of London (Respondent)

Unit: “all employees of J. & W. Corp. o/a ServiceMaster Contract Services of London at 2724 Roxburgh Road in the City of London, save and except non-working supervisors and persons above the rank of non-working supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

1934-93-R: United Food & Commercial Workers, Local 206, chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Kelloryn Hotels (Morrisburg) Inc. (Respondent)

Unit: “all employees of Kelloryn Hotels (Morrisburg) Inc. c.o.b. as Howard Johnson Hotel, in the Town of Morrisburg, save and except supervisors, persons above the rank of supervisor, front desk, office and clerical staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

1960-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. D & B Enterprises (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of D & B Enterprises in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of D & B Enterprises in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1961-93-R: United Steelworkers of America (Applicant) v. Weston Bakeries Limited (Respondent)

Unit: “all employees of Weston Bakeries Limited in the City of Kitchener, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except forepersons and persons above the rank of foreperson, office, sales staff, and persons for whom any trade union held bargaining rights as of September 15, 1993” (44 employees in unit) (*Having regard to the agreement of the parties*)

1966-93-R: Canadian Security Union (Applicant) v. Maple Leaf Gardens, Limited (Respondent)

Unit: “all security guards employed by Maple Leaf Gardens Limited in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except supervisors and those above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

1976-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. employed at the Government of Canada, London

Airport, 750 Crumlin Side Road, in the City of London, save and except supervisors, persons above the rank of supervisor, office and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1977-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited employed at 3M Tartan Place, 300 Tartan Drive, in the City of London, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1978-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited employed at Cuddy Food Products, 1226 Trafalgar Street, in the City of London, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

1990-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hyd-Mech Engineering Ltd. (Respondent)

Unit: "all employees of Hyd-Mech Engineering Ltd. in the City of Woodstock, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (60 employees in unit) (*Having regard to the agreement of the parties*)

1992-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: "all employees of Ontario Guard Services Inc. working at 77 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1995-93-R: American Federation of Grain Millers AFL/CIO/CLC Local #242 (Applicant) v. Ralston Purina Canada Inc. (Respondent)

Unit: "all employees of Ralston Purina Canada Inc. in the Town of Strathroy, save and except supervisors, persons above the rank of supervisor, office and clerical employees and laboratory employees" (13 employees in unit) (*Having regard to the agreement of the parties*)

2001-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 954633 Ontario Inc. c.o.b. M & S Plumbing (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of 954633 Ontario Inc. c.o.b. M & S Plumbing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of 954633 Ontario Inc. c.o.b. M & S Plumbing in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2002-93-R: Teamsters Local Union No. 419 (Applicant) v. 979504 Ontario Limited c.o.b. as Seafood Alliance Co. (Respondent)

Unit: "all employees of 979504 Ontario Limited c.o.b. as Seafood Alliance Co. at 4545 Steeles Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

2003-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited at 1840 Oxford Street East in the City of London, save and except supervisors and persons above the rank of supervisor" (18 employees in unit) (*Having regard to the agreement of the parties*)

2006-93-R: Hotel Employees Restaurant Employees Union Local 75 (Applicant) v. Luis Foods Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Luis Foods Limited, c.o.b. Harvey's Restaurant, at 2029 Jane Street, in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (16 employees in unit) (*Having regard to the agreement of the parties*)

2012-93-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Limited c.o.b. as Free Press (Respondent) v. Group of Employees, Group of Employees, Group of Employees, Group of Employees (Objectors)

Unit: "all employees of Thomson Newspapers Company Limited c.o.b. as Free Press in the City of Midland, save and except the Publisher, the Accountant, the Advertising Manager, the Circulation Manager, the Managing Editor, the Production Foreperson, the Press Room Foreman and the Mailroom Supervisor" (31 employees in unit) (*Having regard to the agreement of the parties*)

2032-93-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. M and K Grocery Corp. (Respondent)

Unit: "all employees of M and K Grocery Corp. o/a LOEB Wycliffe Village in the Town of Richmond Hill, employed in the Meat Department, save and except store managers and persons above the rank of store manager, and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

2038-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A.C.C. Encon (1992) Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of A.C.C. Encon (1992) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of A.C.C. Encon (1992) Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2039-93-R: United Steelworkers of America (Applicant) v. Today's Business Products Ltd. (Respondent)

Unit: "all employees of Today's Business Products Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (56 employees in unit) (*Having regard to the agreement of the parties*)

2049-93-R: United Steelworkers of America (Applicant) v. Esco Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Esco Limited in the Town of Port Hope, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (88 employees in unit) (*Having regard to the agreement of the parties*)

2071-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: “all security guards of Ontario Hydro at its Lennox Thermal Generating Station in the Township of South Fredericksburgh, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of September 24, 1993” (4 employees in unit) (*Having regard to the agreement of the parties*)

2077-93-R: Ontario Public Service Employees Union (Applicant) v. Peterborough and District Association for Community Living (Respondent)

Unit: “all employees of Peterborough and District Association for Community Living in the City of Peterborough, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, those above the rank of supervisor and office and clerical staff” (80 employees in unit) (*Having regard to the agreement of the parties*)

2078-93-R: United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Imota Enterprises Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Imota Enterprises Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Imota Enterprises Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2080-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: “all security guards of Intertec Security & Investigation Ltd. working at 351 Church Street in the Town of Markham, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2083-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. employed in the Municipality of Metropolitan Toronto at: 3300 Don Mills Road, 111 Avenue Road, 5 Shadey Golf Way, 717 Bay Street, 44 Gerrard Street, 410 Queens Quay, 95 Commissioners Street, 439 University Avenue, 121 King Street, 1060 Tapscott Road, 10 Tobermory, 757 Victoria Park Avenue, 50 Bloor Street, 60 Yonge Street, save and except supervisors and persons above the rank of supervisor” (42 employees in unit) (*Having regard to the agreement of the parties*)

2086-93-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Rosen Dairy Products Limited (Respondent)

Unit: “all employees of Rosen Dairy Products Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (28 employees in unit) (*Having regard to the agreement of the parties*)

2092-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. at Fanshawe College, 30, 34 and 35 Seven Up Avenue, 1579 Oxford Street, 520 and 525 First Street, in the City of London, save and except forepersons and persons above the rank of foreperson” (2 employees in unit) (*Having regard to the agreement of the parties*)

2098-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards in the employ of Group 4 C.P.S. Limited at 234 Simcoe Street, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

2099-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all security guards in the employ of Group 4 C.P.S. Limited at 750 Lawrence Avenue West, in the Municipality of Metropolitan Toronto, save and except Site Supervisors and persons above the rank of Site Supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

2110-93-R: IWA Canada, Local 2693 (Applicant) v. Hood Logging Equipment Canada Incorporated (Respondent)

Unit: "all employees of Hood Logging Equipment Canada Incorporated at its shop/garage in the Township of Paipoonge, in the District of Thunder Bay, save and except foremen, persons above the rank of foreman, office staff, parts clerks, sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

2115-93-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Star Brand Packers Ontario Limited (Respondent)

Unit: "all employees of Star Brand Packers Ontario Limited in the Township of Glanbrook, save and except forepersons and persons above the rank of foreperson, sales, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

2119-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all security guards of Intertec Security & Investigation Ltd. in the City of York, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

2127-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Tytrek Graphic Finishers Inc. (Respondent)

Unit: "all employees of Tytrek Graphic Finishers Inc. in the County of Wentworth, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and all persons regularly employed for not more than 24 hours per week" (85 employees in unit) (*Having regard to the agreement of the parties*)

2133-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. MacTel Utilities Inc. (Respondent)

Unit: "all construction labourers, in the employ of MacTel Utilities Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2242-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Leon's Furniture Limited (Respondent)

Unit: "all employees of Leon's Furniture Limited working in the City of Windsor, regularly employed for not more than 24 hours per week, save and except managers and persons above the rank of manager, office and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

2244-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Stinson Security Services Limited (Respondent)

Unit: "all security guards of Stinson Security Limited at Cuddy Food Products, 1226 Trafalgar Street, in the City of London, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

2245-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited employed at Dynacare Laboratories, 245 Pall Mall Street, in the City of London, save and except supervisors and persons above the rank of supervisor" (4 employees in unit)

2362-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning and maintenance at Bell Trinity Square, 483 Bay Street, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (41 employees in unit) (*Having regard to the agreement of the parties*)

2373-93-R: Christian Labour Association of Canada (Applicant) v. North American Construction 1993 Ltd. (Respondent)

Unit: "all construction labourers, in the employ of North American Construction 1993 Ltd. in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Having regard to the agreement of the parties*)

2407-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 26 Wellington Street East and 92 King Street East and 69 Yonge Street in the Municipality of Metropolitan Toronto, and at 2900 Steeles Avenue West in the City of Vaughan, and at 610 Bullock Drive in the Town of Markham, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (28 employees in unit) (*Having regard to the agreement of the parties*)

2408-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Moretti Excavating Ltd. (Respondent)

Unit: "all construction labourers, in the employ of Moretti Excavating Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2409-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all patrol supervisors employed by Meadowvale Security Guard Services Inc. in the Province of Ontario" (10 employees in unit) (*Having regard to the agreement of the parties*)

2438-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: "all security guards of Ontario Hydro at the Thunder Bay Thermal Generating Station, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights on the date of application" (2 employees in unit) (*Having regard to the agreement of the parties*)

2439-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: "all security guards of Ontario Hydro employed at the Atikokan Thermal Generating Station, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights on the date of application" (4 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0219-92-R: Laundry & Linen Drivers & Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Maple Leaf Gardens, Limited (Respondent)

Unit: "all employees of Maple Leaf Gardens, Limited in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, security guards and employees in bargaining units for which any trade union held bargaining rights as of the date of this application" (442 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	358
Number of persons who cast ballots	307
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	307
Number of ballots marked in favour of applicant	168
Number of ballots marked against applicant	139

1450-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Stayner (Respondent)

Unit: "all employees of the Corporation of the Town of Stayner in the Town of Stayner, save and except Directors and Superintendents, persons above the ranks of Director and Superintendent, office and clerical staff" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

1681-93-R: Canadian Union of Public Employees (Applicant) v. Sudbury District Roman Catholic Separate School Board (Respondent)

Unit: "all purchasing, warehousing, custodial and maintenance staff of the Sudbury District Roman Catholic Separate School Board in the District of Sudbury, regularly employed for not more than 24 hours per week, save and except Chief Custodians - Secondary and Foremen, and persons above the rank of Chief Custodian - Secondary and Foreman, and office staff" (37 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	3

Applications for Certification Dismissed Without Vote

0278-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 697643 Ontario Ltd. c.o.b. as Marcove Partition Company (Respondent) (5 employees in unit)

0066-93-R; 0067-93-R: Teamsters Local Union No. 419 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent) (6 employees in unit)

Applications for Certification Withdrawn

1373-93-R: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Atlas Specialized Coatings & Sandblasting Ltd., Atlas Specialized Coatings & Sandblasting Ltd. c.o.b. as Atlas General Painting Contractors Ltd. (Respondent)

1429-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The D.P. Apex Building Corporation (Respondent)

1708-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

1798-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Campana Construction Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

1803-93-R: Graphic Communications International Union, Local N-1 (Applicant) v. The Print Shop, a Partnership between Total Business Systems of Canada Ltd. and #873764 Ontario Inc. (Respondent)

1821-93-R: United Steelworkers of America (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

1823-93-R: United Steelworkers of America (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

1828-93-R: International Alliance of Theatrical Stage Employees, Local 471 (Applicant) v. BCL Entertainment Corp. in its Concert Productions International Division (Respondent)

1902-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) v. The Canadian Union of Professional Security-Guards (Intervener)

1954-93-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Laidlaw Transit Ltd. (Respondent) v. Labourers' International Union of North America, Local 1267 (Intervener)

2007-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

2052-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Nelson Burns and Company Limited (Respondent) v. International Leather Goods, Plastics and Novelty Workers' Union, Local 8 (Intervener)

2118-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

2123-93-R: Association of Canadian Film Craftspeople (Applicant) v. Charles Street Video and Performing Arts Society (Respondent)

2128-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Ross Mechanical Systems Ltd. (Respondent)

2130-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. General Signal Limited (Respondent)

2511-93-R: International Brotherhood of Electrical Workers, Local Union 530 (Applicant) v. Traylor Bros. Inc. (Respondent)

2521-93-R: Labourers' International Union of North America, America, Local 506 (Applicant) v. Northern Structures Inc. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3116-92-R: Retail, Wholesale and Department Store Union AFL-CIO-CLC and its Local 1000 (Applicant) v. The Hudson's Bay Company (Respondent) (*Granted*)

1908-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) v. The Canadian Union of Professional Security-Guards (Intervener) (*Granted*)

1952-93-R: Association of Allied Health Professionals: Ontario (Applicant) v. Carleton Place and District Memorial Hospital (Respondent) (*Granted*)

1955-93-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Laidlaw Transit Ltd. (Respondent) v. Labourers' International Union of North America, Local 1267 (Intervener) (*Withdrawn*)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2364-93-FC: Banlake Associates Limited c.o.b. as Bancroft I.G.A. (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

2420-93-FC: The Cadillac Fairview Corporation Limited (Masonville Place) (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3489-92-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited, J.J. Home Products (Respondents) (*Withdrawn*)

3586-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. The Second Cup Ltd., and David and Janice Heasley (Respondents) (*Granted*)

3785-92-R: Teamsters Union Local 230, Ready Mix, Building Supplies, Hydro and Construction Drivers, Warehouse Men and Helpers (Applicant) v. Ontario Paving Company Limited and Ontario Paving Inc. (Respondents) (*Granted*)

0688-93-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. The Second Cup Ltd., and 953455 Ontario Limited (Respondents) (*Granted*)

0737-93-R: International Union of Operating Engineers Local 793 (Applicant) v. Giuseppe Alfano & Sons Ltd. and Pavex Canada Ltd. and Abco Holdings Inc. and Ontario Paving Company Limited and Ontario Paving Inc. (Respondents) (*Granted*)

0830-93-R; 0832-93-R; 0834-93-R; 0836-93-R; 0971-93-R; 0973-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Sheet Metal Workers' International Association Local 30 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents) (*Granted*)

0851-93-R; 1704-93-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Joe F.

Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

0854-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1690-93-R: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Beta Decorating Ltd., Maler Painting and Diamond Painting Ltd. (Respondents) (*Granted*)

1706-93-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1754-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Ideal Acoustics and Steel Studs Systems Incorporated and/or Ideal Acoustics and Steel Stud Systems Incorporated and Delcor Building and Consulting Limited (Respondents) (*Withdrawn*)

1926-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Colony Electric Limited and Tec-Elect Enterprises Inc. (Respondents) (*Granted*)

1970-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. 744822 Ontario Limited c.o.b. as D & W Building Contractor, Wayneco Steel Services, Emerald Steel (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3489-92-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited, J.J. Home Products (Respondents) (*Withdrawn*)

3586-92-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. The Second Cup Ltd., and David and Janice Heasley (Respondents) (*Granted*)

3785-92-R: Teamsters Union Local 230, Readymix, Building Supplies, Hydro and Construction Drivers, Warehouse Men and Helpers (Applicant) v. Ontario Paving Company Limited and Ontario Paving Inc. (Respondents) (*Granted*)

0688-93-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. The Second Cup Ltd., and 953455 Ontario Limited (Respondents) (*Granted*)

0737-93-R: International Union of Operating Engineers Local 793 (Applicant) v. Giuseppe Alfano & Sons Ltd. and Pavex Canada Ltd. and Abco Holdings Inc. and Ontario Paving Company Limited and Ontario Paving Inc. (Respondents) (*Granted*)

0830-93-R; 0832-93-R; 0834-93-R; 0836-93-R; 0971-93-R; 0973-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Sheet Metal Workers' International Association Local 30 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents) (*Granted*)

0851-93-R; 1704-93-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Joe F. Canadian Masonry Ltd. and Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

0854-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Joe F. Canadian Masonry Ltd. and Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1690-93-R: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Beta Decorating Ltd., Maler Painting and Diamond Painting Ltd. (Respondents) (*Granted*)

1706-93-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1754-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Ideal Acoustics and Steel Studs Systems Incorporated and/or Ideal Acoustics and Steel Stud Systems Incorporated and Delcor Building and Consulting Limited (Respondents) (*Withdrawn*)

1926-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Colony Electric Limited and Tec-Elect Enterprises Inc. (Respondents) (*Granted*)

1970-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. 744822 Ontario Limited c.o.b. as D & W Building Contractor, Wayneco Steel Services, Emerald Steel (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2262-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 461 (Applicant) v. Manning Biscuit Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1747-93-R: Allan Rea Walker (Applicant) v. Graphic Communications International Union, Local 500 M (Respondent) v. Data Business Forms Limited (Intervener)

Unit: "all offset pressmen, press apprentices and press helpers and all strippers, platemakers and apprentices employed in Metropolitan Toronto" (18 employees in unit) (*Withdrawn*)

1780-93-R: Paul Hiscock (Applicant) v. United Steelworkers of America (Respondent) (4 employees unit) (*Granted*)

1817-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

1917-93-R: Daniel P. Brodie (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, Restoration Steeplejacks (Respondent) (*Withdrawn*)

2031-93-R: Gord Court - on behalf of Bargaining Unit Employees of White Store Equipment (Applicant) v. C.A.W. Local 397 (Respondent) v. White Store Equipment - 604211 Ontario Inc. (Intervener)

Unit: "all employees of White Store Equipment 604211 Ontario Inc. of Paris, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a co-

operative training program The Employer recognizes the Union as the sole collective bargaining agent for all employees of the Employer in the bargaining unit defined above.” (9 employees in unit) (*Granted*)

2337-93-R: Jim Beacon (Applicant) v. Canadian Brotherhood of Railway, Transport and General Workers (Respondent) (*Granted*)

2366-93-R: Susan Dentelbeck (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) v. University of Toronto Staff Association (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2334-93-U: Elirpa Construction and Materials Limited (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

2447-93-U: Sayers & Associates Limited (Applicant) v. Sheet Metal Workers’ International Association Local 30, James Moffat and John Collins (Respondents) (*Withdrawn*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT (INDUSTRIAL)

2400-93-U: Ontario Public School Teachers’ Federation, Federation of Women Teachers’ Associations of Ontario, East Parry Sound Women Teachers’ Association, and Ontario Public School Teachers’ Federation, East Parry Sound District (Applicants) v. East Parry Sound Board of Education (Respondent) (*Withdrawn*)

APPLICATIONS FOR DIRECTION CONCERNING SPECIFIED REPLACEMENT WORKERS

2377-93-U: General Chemical Canada Ltd. (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.Canada) Local 89, Amherstburg, Ontario (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1965-90-U; 2139-90-U: John Athan (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener); John Athan (Applicant) v. Toronto Transit Commission (Respondent) v. Amalgamated Transit Union, Local 113 (Intervener) (*Dismissed*)

0942-91-U: Scott D. Heron (Applicant) v. National Grocers Co. Ltd., United Food and Commercial Workers International Union, Local 1000A (Respondents) v. Bob Armor, Fred Boyd and Bob Curtis (Interveners) (*Dismissed*)

2031-92-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Paul Paquette c.o.b. as Rainbow Foods (Respondent) (*Withdrawn*)

3185-92-U: United Steelworkers of America (Applicant) v. Cooper Industries (Canada) Inc. c.o.b. as Wagner Division of Cooper Industries (Canada) Inc. (Respondent) (Terminated)

3445-92-U: Ontario Nurses’ Association (Applicant) v. Oakville Lifecare Centre (Respondent) (*Granted*)

3597-92-U: Southern Ontario Newspaper Guild (Applicant) v. Thomson Newspapers Corporation and The Cambridge Reporter, A Division of Thomson Newspapers Corporation (Respondents) (*Granted*)

3766-92-U: Joanne Edgar (Applicant) v. CAW-Canada, Local 673 (Respondent) v. Spar Aerospace Limited (Intervener) (*Dismissed*)

3808-92-U: Brian Farrell, Ralph Robertson, John Morassut (Applicant) v. C.U.P.E. Local 67, C.U.P.E. National, The Corporation of the City of Sault Ste. Marie (Respondents) (*Dismissed*)

0078-93-U: James W. Nicholson et al (Applicant) v. CAW Local 222, Oshawa, Ontario and John Caines, Pat Blackwood, Cal Pettit, Bruce Adams and Wayne Murphy (Respondents) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

0169-93-U: United Food & Commercial Workers Union, Local 175 (Applicant) v. R. M. Catering (Respondent) (*Withdrawn*)

0171-93-U: United Food & Commercial Workers Union, Local 175 (Applicant) v. Inn of the Woods (Respondent) (*Withdrawn*)

0302-93-U: Janice Bishop (Applicant) v. International Association of Machinists and Riverside Lodge 939 of the International Association of Machinists (Respondents) v. Fleet Industries (Intervener) (*Granted*)

0384-93-U: Brian Edward Quin (Applicant) v. Metropolitan Toronto Civic Employees Union Local 43 and City of Toronto Parks and Recreation (Respondents) (*Withdrawn*)

0827-93-U: Luigi D'Ovidio (Applicant) v. C.U.P.E. Local #66 (Respondent) v. The Corporation of the City of Mississauga (Intervener) (*Withdrawn*)

1016-93-U: Teamsters Local Union No. 419 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent) (*Dismissed*)

1116-93-U: United Food and Commercial Workers International Union Local 175 (Applicant) v. 843547 Ontario Limited c.o.b. as Comfort Inn (Respondent) (*Withdrawn*)

1151-93-U: Chris Hakim (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) Local 1967 (Respondent) v. McDonnell Douglas Canada Ltd. (Intervener) (*Dismissed*)

1207-93-U: International Leather Goods, Plastic and Novelty Workers' Union, Local 8 (Applicant) v. Ray Plastics Limited and United Food and Commercial Workers International Union, Local 175 and Alfred Sartorelli (Respondents) (*Withdrawn*)

1333-93-U: John Oleka (Applicant) v. Ford Motor Company (Respondent) v. C.A.W., Local 707 (Intervener) (*Dismissed*)

1442-93-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Goodfellow Construction Inc. (Respondent) (*Withdrawn*)

1460-93-U: Paulette Spence (Applicant) v. The Toronto Aged Men's and Women's Homes and S.E.I.U. Local 204 (Respondents) (*Dismissed*)

1494-93-U: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The D.P. Apex Building Corporation (Respondent) (*Withdrawn*)

1510-93-U: Fred Dixon (Applicant) v. Smiths Falls Hospital and Brenda Wiltsie Brown, CUPE Local 2119 (Respondents) (*Withdrawn*)

1521-93-U: Denis Almeida (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Mount Sinai Hospital (Intervener) (*Dismissed*)

1524-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Ferma Construction Company Inc.; Ferma Underground Services Inc.; Ferma Construction Limited (Respondent) (*Withdrawn*)

1525-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Norweld Oxygen Inc. (Respondent) (*Withdrawn*)

1538-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Clarence McDonald Excavation Ltd. (Respondent) (*Granted*)

1595-93-U: Jerry B. De Guzman (Applicant) v. United Steelworkers of America, Local 9236 (Respondents) v. Walbar of Canada Inc. (Intervener) (*Dismissed*)

1627-93-U: Reliacare Inc. c.o.b. Maitland Manor (Applicant) v. Service Employees Union, Local 210 (Respondent) (*Withdrawn*)

1689-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. - CANADA) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

1703-93-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1705-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc., Nelas Construction Ltd. (Respondents) (*Granted*)

1744-93-U: United Dairy & Creamery Workers Local 477 Chartered by the Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Ault Foods Limited and Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America (Respondents) (*Withdrawn*)

1762-93-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 141 (Applicant) v. Jade Reclamation Ltd. (Respondent) (*Terminated*)

1801-93-U: Independent Paperworkers of Canada (Applicant) v. Communications, Energy and Paperworkers Union of Canada, C.L.C. and its Local 212 (Respondent) (*Withdrawn*)

1816-93-U: International Union of Operating Engineers, Local 793; Mario Di Adamo; and all Operating Engineers employed by any of the responding party employers (Applicant) v. Labourers' International Union of North America, Local 183, Ferma Construction Company Inc., Ferma Underground Services Inc., Malton Construction Ltd., Ferma Construction Limited, Ferma Concrete & Paving Ltd., Ferma Concrete & Paving (1988) Ltd., Ferma Group Inc., Ferma Crushed Stone Inc., Canada Haulage Inc., and Ferragine Sales and Leasing Ltd. (Respondents) (*Withdrawn*)

1833-93-U: United Steelworkers of America Local 1005 (Applicant) v. Stelco Inc. (Hilton Works) (Respondent) (*Withdrawn*)

1836-93-U: David Keast (Applicant) v. Normbau 2000 Inc. (Respondent) (*Dismissed*)

1861-93-U: Ella Robitaille (Applicant) v. Bourget Nursing Home (Respondent) (*Withdrawn*)

1870-93-U: Community Living Kincardine & District (Applicant) v. Canadian Union of Public Employees (CUPE) & Its Local 3315 (Respondent) (*Withdrawn*)

1936-93-U: Michael Ferro (Applicant) v. Ontario Jockey Club (Respondent) (*Withdrawn*)

1950-93-U: Enrique Jesus Embry (Applicant) v. Canadian Paperworkers Union Local 322, C.L.C. (Respondent) (*Withdrawn*)

- 1959-93-U:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Norcon Industries Inc. and Norcon Corporation (Respondents) (*Granted*)
- 1975-93-U:** Ontario Public Service Employees Union (Applicant) v. Meaford-Beaver Valley Community Support Services (Respondent) (*Withdrawn*)
- 2008-93-U:** Hashim Mohammad Abul (Applicant) v. Rank Hotels North America c.o.b. as Hotel Plaza II (Respondent) v. Hotel Employees Restaurant Employees Union Local 75 (Intervener) (*Withdrawn*)
- 2035-93-U:** Graphic Communications International Union, Local 500M (Applicant) v. Data Business Forms (Don Mills Division) (Respondent) (*Withdrawn*)
- 2036-93-U:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 (Applicant) v. Famous Players Inc. (Respondent) (*Granted*)
- 2043-93-U:** Labourers' International Union of North America, Local 1267 (Applicant) v. Laidlaw Transit Ltd. (Respondent) (*Withdrawn*)
- 2062-93-U:** United Steelworkers of America (Applicant) v. Shelter Canadian Properties Limited (Respondent) (*Withdrawn*)
- 2087-93-U:** Communications, Energy and Paperworkers Union of Canada, (Applicant) v. Tytrek Graphic Finishers Inc. (Respondent) (*Withdrawn*)
- 2090-93-U:** Shirley Hwang (Applicant) v. Cathy McQuarrie, Local Union President Local 1144 CUPE (Respondent) (*Withdrawn*)
- 2103-93-U:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Limited (Respondent) (*Withdrawn*)
- 2109-93-U:** Beverly Bovair, Marlyn Ephgrave (Applicants) v. William Love, Mary Tennant, Janice Duff, Eleanor Gilpin (Respondents) (*Withdrawn*)
- 2249-93-U:** Jean Vandette (Applicant) v. Retail, Wholesale and Department Store Union, Local 582 (Respondent) (*Withdrawn*)
- 2360-93-U:** Service Employees Union, Local 183 (Applicant) v. St. Leonard's Home Inc. (Respondent) (*Withdrawn*)
- 2365-93-U:** Canadian Union of Professional Security-Guards (Applicant) v. Group 4 C.P.S. Limited, Mississauga General Hospital and Daniel Howard (Respondents) (*Withdrawn*)
- 2428-93-U:** William Larry Elsdon (Applicant) v. Ontario Public Service Employees' Union, St. Thomas Psychiatric Hospital (Respondents) (*Dismissed*)
- 2432-93-U:** Gina Kostro (Applicant) v. Central Hospital (per David Gibson) (Respondent) (*Dismissed*)
- 2434-93-U:** United Food and Commercial Workers' International Union AFL-CIO-CLC, Local 459 (Applicant) v. Medical Centre Holdings (Leamington Ltd.) and Alan Nicholson (Respondent) (*Withdrawn*)
- 2460-93-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Rosen Dairy Products Ltd. (Respondent) (*Withdrawn*)
- 2490-93-U:** George Holt (Applicant) v. Phillips Cable (Respondent) (*Dismissed*)
- 2506-93-U:** United Food and Commercial Workers Union, Local 175 (Applicant) v. Loeb Club Plus Wycliffe (Respondent) (*Withdrawn*)

2550-93-U: J.E. Shea (Applicant) v. Pioneer Logistics (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1208-93-M: International Leather Goods, Plastic and Novelty Workers' Union, Local 8 (Applicant) v. Ray Plastics Limited and United Food and Commercial Workers International Union, Local 175 and Alfred Sartorelli (Respondents) (*Withdrawn*)

2117-93-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1256 (Applicant) v. Crown Fab Division, The Allen Group Canada, Limited (Respondent) (*Granted*)

2462-93-M: Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351 (Applicant) v. The Cambridge Suites Hotel Limited (Respondent) (*Terminated*)

2504-93-M: United Food and Commercial Workers Union Local 175 (Applicant) v. Loeb Club Plus Wycliffe (Respondent) (*Withdrawn*)

TRUSTEESHIP

1632-92-T: Canadian Paperworkers Union (Applicant) v. Canadian Paperworkers Union, Local 595 (Respondent) v. Mr. Aldo Talarico (Intervener) (*Granted*)

FINANCIAL STATEMENT

1528-93-M: Roland Vautour Member IBEW Local 1687 (Applicant) v. Larry Lineham and the Executive Board of the International Brotherhood of Electrical Workers, Local 1687 (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

0952-93-JD: The Labourers' International Union of North America, Ontario Provincial District Council, and the Labourers' International Union of North America, Local 625 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 494 and Delsan Demolition Limited (Respondents) (*Granted*)

1688-93-JD: International Brotherhood of Electrical Workers, Local Union 120 (Applicant) v. Labourers' International Union of North America, Local 1059 and Ellis-Don Construction Ltd. and Ainsworth Electric Co. Limited (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0659-93-M: The Canadian Union of Public Employees, Local 2595 (Applicant) v. Canadian Bureau for International Education (Respondent) (*Withdrawn*)

0996-93-M: Association of Allied Health Professionals: Ontario (Applicant) v. Baycrest Centre for Geriatric Care (Respondent) (*Withdrawn*)

1395-93-M: The Corporation of the County of Peterborough (Applicant) v. Canadian Union of Public Employees, Local 126 (Respondent) (*Withdrawn*)

1659-93-M: The Canadian Union of Public Employees and its Local 841 (Applicant) v. The Corporation of the County of Elgin (Library Department) (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0425-93-OH: Mr. George Egri and OPSEU (Applicant) v. Ministry of Transportation (Respondent) (*Withdrawn*)

0747-93-OH: The Canadian Union of Public Employees and its Local 942 (Applicant) v. The Royal Ottawa Health Care Group and Jerry Rogers (Respondents) (*Withdrawn*)

1028-93-OH: Gary E. Insley (Applicant) v. Arnone Shooting Range Inc. and Len Arnone (Respondent) (*Dismissed*)

1796-93-OH: Pat Wilkins (Applicant) v. Belleville Intelligencer (Respondent) (*Withdrawn*)

1980-93-OH: Brian T. Levens (Applicant) v. Clarence McDonald Excavation Ltd. (Respondent) (*Withdrawn*)

2063-93-OH: Jonathan Polak (Applicant) v. Beach McLeod (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2924-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Construction Limited (Respondent) (*Granted*)

2925-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Company Limited (Respondent) (*Granted*)

4036-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Powertel Utilities Contractors Ltd. (Respondents) (*Withdrawn*)

4038-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Standard Underground High Voltage (Respondents) (*Withdrawn*)

4039-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and M.V. Mark Incorporated (Respondents) (*Withdrawn*)

4040-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Sharon High Voltage Cons. Ltd. (Respondents) (*Withdrawn*)

4041-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

4042-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Bennett & Wright Limited (Respondents) (*Withdrawn*)

4043-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Comstock Canada (Respondents) (*Withdrawn*)

4044-91-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and State Contractors (Respondents) (*Withdrawn*)

4045-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association, Bechtel Canada Inc. (Respondents) (*Withdrawn*)

4046-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Joy MK Projects Company (Respondents) (*Withdrawn*)

4047-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

4048-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Power Line Construction (Respondents) (*Withdrawn*)

4049-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association, J.V. McDonnell (Respondents) (*Withdrawn*)

4050-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Guild Electric Ltd. (Respondents) (*Withdrawn*)

4051-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Tee Jay Instrumentation (Respondents) (*Withdrawn*)

4052-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Paul Mellon Enterprises (Respondents) (*Withdrawn*)

4053-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Howden Electric (Respondents) (*Withdrawn*)

4054-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Howden Canada Inc. (Respondents) (*Withdrawn*)

4055-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Christopher Electric (Respondents) (*Withdrawn*)

4056-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Black & McDonald (Respondents) (*Withdrawn*)

4057-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association, and Bennett & Wright Ltd. (Respondents) (*Withdrawn*)

4058-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Powertel Utilities (Respondents) (*Withdrawn*)

4059-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Bright Electric (Peterborough) Ltd. (Respondents) (*Withdrawn*)

4106-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Wm. Duffy Electric Contractor Limited (Respondents) (*Withdrawn*)

4107-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and Canada Electric (Respondents) (*Withdrawn*)

4108-91-G: International Brotherhood of Electrical Workers, Electrical Power Systems Construction Council of Ontario (Applicant) v. The Electrical Power Systems Construction Association and P.J. Electric Consolidated (Respondents) (*Withdrawn*)

2330-92-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 and Local 93 (Applicant) v. The Rock Corporation of Canada Inc. (Respondent) (*Granted*)

2793-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Triple-M-Services Demolition Experts; Consolidated Wrecking Company Limited (Respondents) (*Withdrawn*)

3038-92-G: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. The Second Cup Ltd. (Respondent) (*Granted*)

3108-92-G: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Erin Haulage (Toronto) Inc. (Respondent) (*Granted*)

3113-92-G: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Ontario Paving Company Limited (Respondent) (*Granted*)

3488-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent) (*Withdrawn*)

3786-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. The Second Cup Ltd. (Respondent) (*Granted*)

0335-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. D-Dixie Drywall Inc. (Respondent) (*Granted*)

0373-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Boen Steel Corp. c.o.b. as Skyline Steel Company, Summit Steel Corp. (Respondents) (*Withdrawn*)

0735-93-G; 0736-93-G: International Union of Operating Engineers Local 793 (Applicant) v. Giuseppe Alfano and Sons Ltd. (Respondent); International Union of Operating Engineers Local 793 (Applicant) v. Pavex Canada Ltd. and Abco Holdings Inc. (Respondents) (*Granted*)

0831-93-G; 0833-93-G; 0835-93-G; 0837-93-G; 0970-93-G; 0972-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Sheet Metal Workers' International Association, Local 30 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents); Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents) (*Granted*)

0852-93-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Joe F. Canadian Masonry Ltd., Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

0853-93-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Joe F. Canadian

Masonry Ltd. and Uptown Masonry Ltd., P.A. Rental Equipment 92 Inc. and Nelas Construction Ltd. (Respondents) (*Granted*)

1112-93-G: The International Brotherhood of Painters and Allied Trades Local 1590 (Applicant) v. The Electrical Power Systems Construction Association Bruce Nuclear Power Plant (Respondent) (*Withdrawn*)

1164-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. M. Fanone Plumbing Mechanical Contractor Ltd. and The Metropolitan Plumbing & Heating Contractors Association (Respondents) (*Granted*)

1197-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. B.J. Normand Ltd. (Respondent) (*Withdrawn*)

1216-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Habit Steel Construction (Respondent) (*Granted*)

1253-93-G; 1254-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Abel Metal Limited (Respondent) (*Withdrawn*)

1622-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Harbour Carpentry (Respondent) (*Withdrawn*)

1693-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Torino Drywall Systems (Respondent) (*Granted*)

1721-93-G; 1722-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Pagani Drywall (1991) Ltd. and Angelo Pagani Drywall Contractor (Respondents) (*Granted*)

1755-93-G: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Delcor Building and Consulting Limited (Respondent) (*Withdrawn*)

1776-93-G: International Brotherhood of Painters and Allied Trades, Local 200, Ottawa (Applicant) v. Beacon Curtainwell Systems Inc. (Respondent) (*Granted*)

1824-93-G: Local 96 International Union of Elevator Constructors (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

1925-93-G: International Brotherhood of Electrical Workers, local 353 (Applicant) v. Colony Electric Limited and Tec-Elect Enterprises Inc. (Respondent) (*Granted*)

1937-93-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Great Northern Industries Inc. (Respondent) (*Granted*)

1957-93-G; 1958-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Norcon Industries Inc. and Norcon Corporation (Respondents) (*Granted*)

1969-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. 744822 Ontario Limited c.o.b. as D & W Building Contractor, Wayneco Steel Services, Emerald Steel (Respondents) (*Withdrawn*)

2015-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. Inc. Canada (Respondent) (*Withdrawn*)

2019-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Costa Earthmoving Inc. (Respondent) (*Withdrawn*)

2025-93-G: Drywall, Acoustic Lathing and Insulation Local 675 (Applicant) v. Bradscott Construction Limited (Respondent) (*Withdrawn*)

2058-93-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. F.A. Coombs Sheet Metal Limited (Respondent) (*Withdrawn*)

2073-93-G; 2074-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Bonanza Drywall & Acoustics (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Rosmar Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

2101-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Gascon Associated Erectors Ltd. (Respondent) (*Withdrawn*)

2102-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Dasa Plumbing Ltd. (Respondent) (*Withdrawn*)

2104-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2105-93-G: International Union of Operating Engineers Local 793 (Applicant) v. Wimpey Minerals Canada (Respondent) (*Withdrawn*)

2144-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. D.O.V.V. Investments Limited (Respondent) (*Withdrawn*)

2147-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Thornber & Brown Mechanical Contractors (Respondent) (*Granted*)

2240-93-G: Christian Labour Association of Canada (Applicant) v. Upper Canada Insulation Services Limited (Respondent) (*Granted*)

2248-93-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Salter Construction Ltd. (Respondent) (*Granted*)

2352-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. 877138 Ontario Inc. o/a Bud's Contracting (Respondent) (*Granted*)

2353-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. JDR Tools & Equipment Division of 810332 Ontario Inc. (Respondent) (*Granted*)

2363-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Collingwood Plumbing Limited (Respondent) (*Granted*)

2390-93-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Dolyn Developments Inc. (Respondent) (*Withdrawn*)

2394-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 787 (Applicant) v. John Baycroft Mechanical Systems (Respondent) (*Withdrawn*)

2435-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario (Applicant) v. C.N. Bricklayers Inc. and Permar Construction Inc. (Respondents) (*Granted*)

2444-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, Local Union 463 (Applicant) v. Gus Mechanical Engineering Inc. (Respondent) (*Granted*)

2463-93-G: Formwork Council of Ontario (Applicant) v. Starcip Forming Ltd., Truestar Forming Ltd. (Respondents) (*Withdrawn*)

2466-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Rosscor General Contractors (Respondent) (*Withdrawn*)

2472-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simple X Electric (1987) Inc. (Respondent) (*Granted*)

2474-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lenwick Building Systems Inc. (Respondent) (*Withdrawn*)

2477-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Triple A Electric Limited (Respondent) (*Withdrawn*)

2478-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Concept Systems Electric (Respondent) (*Withdrawn*)

2481-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Plaza Electric Contractors Ltd. (Respondent) (*Granted*)

2486-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Charles J. Wilson Limited (Respondent) (*Granted*)

2556-93-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) (*Withdrawn*)

2560-93-G: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of the International Union of Bricklayers and Allied Craftsmen, Local 20, Oshawa (Applicant) v. McBride Group Inc. (Respondent) (*Withdrawn*)

2566-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Calorific Construction Ltd. (Respondent) (*Withdrawn*)

2583-93-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. System Insulation (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

4074-91-M: Wellington County Roman Catholic Separate School Board (Applicant) v. Wellington Separate Support Staff Association (Respondent) (*Dismissed*)

3397-92-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Peacock Lumber Ltd. (Respondent) (*Dismissed*)

0150-93-R: Association des Professionnels du CEFCUT - APC (Applicant) v. Le Conseil des écoles françaises de la communauté urbaine de Toronto (Respondent) v. CUPE Local 3519 (Intervener) (*Withdrawn*)

2154-83-OH; 1137-93-U; 1138-93-OH: Murray Strong (Applicant) v. General Motors of Canada Limited, and Mr. Ron Broad (Respondents) (*Dismissed*)

1221-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. City Steel Construction (Respondent) (*Dismissed*)

1250-93-R; 1251-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (*Withdrawn*)

1266-93-R: United Brotherhood of Carpenters and Joiners of America Local 785, United Brotherhood of Carpenters and Joiners of America Local 2486 (Applicants) v. Rome Construction Ltd., Primo General Contracting Inc. (Respondent) (*Dismissed*)

1267-93-G: United Brotherhood of Carpenters and Joiners of America Local 2486 (Applicants) v. Rome Construction Ltd., Primo General Contracting Inc. (Respondent) (*Dismissed*)

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ISSN 0383-4778

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